SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 80.

THE UNITED STATES, APPELLANT,

vs.

ISAAC T. COOK, EXECUTOR OF THE ESTATE OF WILLIAM SYLVESTER EAMES, AND THOMAS CRANE YOUNG.

APPEAL FROM THE COURT OF CLAIMS.

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1 I. *Petition and Exhibits, filed January 12, 1917.*

In the Court of Claims of the United States, Term, 1916–1917.

ISAAC T. COOK, EXECUTOR OF THE ESTATE OF William Sylvester Eames, and Thomas Crane Young, claimants, *vs.* UNITED STATES OF AMERICA, DEFENDANTS.	No. 33700

Petition.

I.

Claimants for their cause of action state that at all times hereinafter mentioned and until the 5th day of March, 1915, William Sylvester Eames and Thomas Crane Young were members of a partnership known by the firm name of Eames & Young, with offices in the city of St. Louis and State of Missouri, engaged in business as drawing, designing, and supervising architects. That on said 5th day of March, 1915, the said William Sylvester Eames, a resident of the city of St. Louis, State of Missouri, died, and that on the 8th day of March, 1915, Isaac T. Cook was, by the probate court of the
2 city of St. Louis and State of Missouri, duly appointed as the executor of his last will and testament, and that claimants are vested with and the owners of all the property, rights and claims of said firm of Eames & Young.

II.

That on the 9th day of July, 1903, the defendant, acting through its Treasury Department, by letter of the Acting Secretary of the Treasury of said date, submitted to the said firm of Eames & Young a certain program for a competition for the selection of an architect for the erection of a United States customhouse building at San Francisco, California. That a copy of said letter of said Acting Secretary of July 9, 1903, is hereto attached, filed herewith and marked Exhibit "A" and is made a part of this petition. That the said firm of Eames & Young was invited to submit to the said Treasury Department, in conformity with said program for competition and in honorable competition with eleven other architects, a design for such United States customhouse. That pursuant to such invitation the said Eames & Young did submit to the said Treasury Department, plans, drawings, specifications, and estimates for the erection of such customhouse at San Francisco, which said plans, drawings, specifications, and estimates were by said Treasury Department approved, and the said Eames & Young were duly selected on the 19th day of December, 1903, as architects for said building by letter of the Acting Secretary of the Treasury of said date.

III.

That on the 6th day of February, 1904, the defendant,
3 through its Treasury Department, entered into a contract with the said firm of Eames & Young, wherein it was agreed that the said firm of Eames & Young should be and become the architects for said United States customhouse building in San Francisco, and as such architects should prepare detailed plans, working drawings, designs, specifications, and estimates for, and should locally supervise the erection of said customhouse building in strict and full accordance with the terms, conditions, and requirements of the letter addressed to said firm of Eames & Young by the Acting Secretary of the Treasury on July 9, 1903; the program governing said competition; the amended regulations for the enforcement of the act approved February 20, 1893, etc.; the letters addressed to the said firm of Eames & Young by the Acting Secretary of the Treasury in December, 1903, and February 4, 1904. It was further agreed by and between the parties to said contract that as compensation for the services to be rendered for the preparation of said plans, drawings, specifications, and designs and for supervision, the said firm of Eames & Young should have and receive from the defendant a fee computed at the rate of five per centum upon the actual cost of the work executed from the drawings and specifications prepared by the said firm of Eames & Young and under their supervision, and that upon, and after the completion of said building, the amount of the compensation should be finally computed. That by said contract it was further provided that for making changes in the plans, drawings, and specifications, etc., as might be directed, a just compensation should be made to said firm of Eames & Young. A copy of said contract, together with the letters, program, and regulations therein referred to and constituting part thereof, is hereto attached
4 and herewith filed and is marked Exhibit "B," and by this reference is made a part of this petition.

IV.

That the said firm of Eames & Young did, in accordance with said contract, prepare detailed plans, working drawings, designs, specifications, and estimates for said customhouse, and did locally supervise the erection thereof and did fully comply with all of the terms and provisions of said contract; that the erection of said customhouse was completed under their supervision on the 16th day of January, 1911; that the said firm of Eames & Young continued to render the services required by their said contract; and that the claims against the defendant hereinafter set out first accrued subsequent to said 16th day of January, 1911.

V.

Claimants further state that defendant in its said program for competition, which is attached to and constitutes part of said contract, required that provision be made for the location in said customhouse building, of a subtreasury, by the following provision of said program:

"SUBTREASURY.

Assistant treasurer	400 sq. ft.
Chief clerk	320 sq. ft.
Business office with 60 ft. counter	4,000 sq. ft.
Daily working vault in office	360 sq. ft.
Coin storage vaults	2,000 sq. ft.

These vaults, if not on the same floor with subtreasury,
5 should have connection with same by private staircase, and should be situated conveniently for receipt and shipment of coin by private entrance."

That pursuant to said requirements, the said firm of Eames & Young, in their competitive design which was accepted and approved by the defendant, and in the detailed plans, working drawings, designs, and specifications which they prepared for said customhouse, subsequent to the execution of said contracts, which were also accepted and approved by said defendant, provided for the space called for by said program and said contract to be used as such subtreasury, and that after said plans, working drawings, designs, and specifications had been approved by said defendant, and after the contract for the construction and erection of said building had been made and was in course of performance, the defendant changed its intention with respect to providing space for a subtreasury in said customhouse building and determined to erect a separate building in San Francisco for such subtreasury, and that defendant thereupon in writing required the said firm of Eames & Young as such architects to so change the plans, drawings, specifications, etc., which it had theretofore approved for said customhouse building, as to eliminate therefrom the said provisions for said subtreasury, which changes involved additional and extra work not required for the completion of the building according to the plans, designs, specifications, and drawings accepted by the defendant, and not required to insure its proper construction and completion within the limit of its cost as provided in said contract. That the said firm of Eames & Young, complying with said requirement, did so change said plans, drawings, specifications, etc.,
as to eliminate the space theretofore provided for the sub-
6 treasury, which changes were approved by the defendant. That in so doing the said firm of Eames & Young performed extra work of the reasonable value of one thousand two hundred dollars ($1,200.00), for which service, under the provisions of said

contract, they are entitled to compensation from the defendant. That demand has been made therefor, but that the defendant has refused and still continues to refuse to compensate them for such extra work.

VI.

As another and further claim arising in connection with said contract and out of the worok done by said firm of Eames & Young thereunder, claimants state that said contract as originally executed did not require the said architects to include or make provision for or render services in connection with an electric power plant in their plans, working drawings, designs, specifications, and supervision for said customhouse, but, on the contrary, specifically excluded work in connection with such plant unless specially ordered in writing by said department. That thereafter, and subsequent to the aforesaid approval of said plans, specifications, and drawings and subsequent to the letting of the contract for erecting said building and while said contract was in course of performance, the said Treasury Department, on, to wit, the first day of May, 1908, did, by an instrument of writing, order the said architects to prepare the drawings and specifications necessary for such electric power plant for the service of said customhouse building, said plant to be located in the basement in the United States appraiser's stores building which was situated adjacent to said customhouse.
7 That the said Eames & Young, complying with said order, did prepare the necessary drawings, estimates, and specifications for the installation of such electric power plant and did submit the same to the said Treasury Department, by which they were approved. That after such approval, the defendant, acting through its Treasury Department, determined not to install said electric light plant in said appraiser's stores building, and such installation was never done. That said architects in preparing such drawings and specifications performed an extra work beyond the services contemplated by said contract to be paid for by their fee of five per centum of the actual cost of erection of said building, of the reasonable value of two thousand seven hundred and twenty-five dollars ($2,725.00), for which, under the provisions of said contract, they are entitled to compensation. That on the 14th day of January, 1911, said architects presented a claim to said Treasury Department for said sum of two thousand seven hundred twenty-five dollars ($2,725.00) on account of the extra work so performed on the drawings and specifications so prepared for the installation of such electric power plant, which said claim defendant has refused and still continues to refuse to allow or pay.

VII.

As another and further claim arising under said contract, claimants state that the defendant, acting through its Treasury Depart-

ment, has allowed and paid to the firm of Eames & Young on account of the fee computed at the rate of 5 per cent per annum upon the actual cost of the work executed from the drawings and specifications and under the supervision of said Eames & Young,
8 as provided in said contract, the sum of sixty-eight thousand three hundred ten and 40/100 dollars ($68,310.40), which said sum was finally paid, on, to wit, the 3rd day of March, 1913, and did not include any of the claims herein set forth. That the firm of Eames & Young at the time of receiving said payment protested that said sum was not the full sum to which said firm was justly entitled and made the claims for additional compensation herein set forth. That the sum so paid said firm of Eames & Young was 5 per centum of one million, three hundred sixty-six thousand, two hundred fifteen and 40/100 dollars ($1,366,215.40), which was the expected cost of said building according to the original contract for the erection of said building between the defendant and Thomas Butler, the contractor for the construction of said building. That subsequent to the original execution of the contract between defendant and Thomas Butler, the actual cost of said building to the defendant was increased by the additional amount of one hundred one thousand nine hundred seven and 66/100 dollars ($101,907.66), the said addition to the cost of said work being allowed and paid to said Thomas Butler by defendant on account of the losses and damages sustained by said Thomas Butler in the fulfillment of his contract in consequence of the San Francisco earthquake, said payment being made in, to wit, the month of May, 1913, in pursuance of an act of Congress approved May 27, 1908, and the action of the Secretary of the Treasury thereby authorized. That the said firm of Eames & Young, as the architects of said building, were called upon, in writing, by the defendant, prior to the payment of said additional sum, to report with respect to the proper additional amount so to be paid to said Thomas Butler, and in what re-
9 spect the earthquake increased the cost of said work to said Thomas Butler, contractor; and that said Eames & Young made to the Treasury Department the report so requested.

That on account of the additional cost of the work contemplated by the plans and specifications prepared as aforesaid by said firm of Eames & Young, represented by the additional payment to said Thomas Butler of one hundred one thousand nine hundred seven and 66/100 dollars ($101,907.66), the said firm of Eames & Young, as such architects, are entitled, under the terms of their said contract with the defendant, to five per centum of said additional cost, or the sum of five thousand ninety-five and 38/100 dollars ($5,095.38), the payment of which said sum the said firm of Eames & Young and the plaintiffs, as their successors in interest, have repeatedly demanded of the defendant, but which the defendant has refused to pay.

VIII.

Claimants further state that on the 5th day of July, 1913, a relief bill was introduced on their behalf, in the House of Representatives of the 63rd Congress of the United States, providing for an appropriation out of the Treasury of the United States, covering all of the claims hereinabove set out, together with other items not herein included. That said bill was referred to the Committee on Claims, which said committee, after a hearing, reported said bill back to the House with a recommendation that the Secretary of the Treasury be authorized to pay to claimants the sum of two thousand five hundred forty-four and 86/100 dollars ($2,544.86). Said bill,
10 as amended by the committee, remained upon the House calendar without coming to a vote until the final adjournment of the 63rd Congress.

IX.

That on the 4th day of January, 1916, a relief bill was introduced on behalf of petitioners into the House of Representatives of the 64th Congress of the United States, providing for an appropriation out of the Treasury of the United States covering all of the claims hereinabove set out, together with other items not herein included. That said bill was referred to the Committee on Claims, which said committee has not reported said bill back to the House at the date of the filing of this petition.

X.

That on the 11th day of May, 1916, a resolution was introduced into the House of Representatives of the 64th Congress of the United States to refer said last-mentioned bill to the Court of Claims for a finding of facts and conclusions of law. That said resolution is pending on the calendar of the House at the date of the filing of this petition.

XI.

Claimants further state that they have not assigned said claim or any part thereof or interest therein. That the claimants and each of them, as well as William Sylvester Eames, deceased, have at all times borne true allegiance to the Government of the United States
11 and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government, that said claimants are justly entitled to the amounts herein claimed from the United States after allowing all just credits and offsets, and that they believe the facts hereinabove stated to be true.

Wherefore claimants pray that judgment be entered in their behalf and against the defendant for a total sum of nine thousand

twenty and 38/100 dollars ($9,020.38), together with the costs laid out and expended by them in the prosecution of this suit.

ISAAC T. COOK,
Executor of Estate of William Sylvester Eames.
THOMAS CRANE YOUNG.

STATE OF MISSOURI,
City of St. Louis, ss.

The undersigned, Isaac T. Cook and Thomas Crane Young, and each of them, first being duly sworn, do say that the statements made and facts set forth in the foregoing petition are true and correct to their best knowledge and belief.

ISAAC T. COOK.
THOMAS CRANE YOUNG.

Subscribed and sworn to before me on this the 10th day of January, 1917.

[SEAL]. A. ELLA KLOBASA,
Notary Public.

My commission expires on the 27th day of July, 1917.

Exhibit "A."

Lou

TREASURY, DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, July 9, 1903.

In replying to this letter the initials in upper right-hand corner must be referred to.

(Enclosure.)

Messrs. EAMES & YOUNG,
Architects, Lincoln Trust Building, St. Louis, Mo.

GENTLEMEN: I take pleasure in hereby inviting you to submit to this department, in honorable competition with eleven other architects, a design for the United States building which it is proposed to erect in San Francisco, Calif., for the accommodation of the custom-house and other offices.

The further conditions and particulars of the competition are set forth in the regulations approved by the department February 24th, 1903, and in the programme this day issued by the Supervising Architect, copies of which are herewith enclosed, together with a plat of the site and a list of competitors and judges.

I will appreciate your early acceptance of this invitation or, failing that, the prompt return of the enclosures so that an alternative competitor may be selected and notified.

Respectfully,

(Signed) H. A. TAYLOR,
Acting Secretary.

13 *Exhibit "B."*

Contract between the United States of America and Eames & Young.

Whereas, in pursuance of the authority contained in the acts of Congress approved February 20, 1893, and June 6, 1902, several architects were invited to submit in competition (under certain regulations, etc., provided therefor) plans, drawings, specifications, estimates, etc., for the erection of a new customhouse at San Francisco, Cal.; and

Whereas the design submitted by said Eames & Young has been ranked number one by the commission whose duty it was to judge and report to the Secretary of the Treasury as to the relative merits of the designs and plans submitted in said competition; and

Whereas, by letter dated December 19, 1903, the Acting Secretary of the Treasury notified said Eames & Young that the report of said commission had been that day approved and said Eames & Young selected as the architects of said building; and

Whereas the plans, etc., submitted by said Eames & Young have been duly approved by the Postmaster General, the Secretary of the Interior, and the Secretary of the Treasury, as required by the act of Congress approved March 3, 1875; and

Whereas, by letter dated February 4, 1904, the Acting Secretary of the Treasury notified said Eames & Young that their competitive design for said building had been approved, as provided by section twelve of the regulations hereinafter mentioned;

Now, therefore, this agreement made and entered into by and between the Secretary of the Treasury, for and in behalf of the United States of America, of the first part, and Eames & Young, a partnership composed of William S. Eames and Thomas C. Young, of St. Louis, Mo., of the second part, witnesseth:

That the party of the second part, for the consideration hereinafter mentioned, covenant and agree to and with the party
14 of the first part to render all the services required in the preparation of detailed plans, working drawings, designs, specifications, estimates, etc., or changes therein, required to be made in connection with the construction of said building, and to locally supervise its erection, in strict and full accordance with the terms, conditions, and requirements of the letter addressed to said party of the second part by the Acting Secretary of the Treasury on July 9, 1903, inviting said party of the second part to enter into said competition; the program governing said competition; the amended "Regulations for the enforcement of the act approved February 20, 1893, etc."; the letters addressed to said party of the second part by the Acting Secretary of the Treasury on December 19, 1903, and February 4, 1904, notifying them of the approval of the report of said judges and the selection of said party of the second part as the architects of said building and of the approval of their competitive design, etc., there-

for; a true and correct copy of each of which said papers is attached hereto and which, together with said design (as shown by approved drawings numbered EY–1 to EY–5, inclusive), estimate, etc., submitted in said competition by said party of the second part and now on file in the Office of the Supervising Architect of the Treasury Department, form part of this contract.

And the party of the second part further covenant and agree to revise the approved drawings to meet the further requirements of the Secretary of the Treasury, if called upon by him to do so, and to prepare full detailed working drawings and specifications for the said building; and thereafter, from time to time, to make such changes in plans, drawings, and specifications, etc., as may be directed by the Secretary of the Treasury, for which such just compensation shall be made as may be agreed upon in advance between the parties hereto.

And the party of the second part further covenant and agree to provide, without cost to the United States, one set of tracings of all working drawings, including details; one copy of specifications, and one copy of detailed estimate of cost of the entire building, all of which, together with the approved drawings, shall remain in the custody of the Treasury Department and be and remain the property of the party of the first part.

And the party of the second part further covenant and agree to make, whenever required so to do by the Secretary of the Treasury, without expense to the United States, such revisions and alterations in the working drawings and specifications of said building as may be necessary to insure its proper construction and completion within the limit of cost as furnished by the Supervising Architect; but no changes in the plans, drawings, and specifications shall be made without written authority from the Secretary of the Treasury.

And the party of the second part further covenant and agree to furnish to the proper contractor and the superintendent of construction (hereinafter mentioned) one copy each of all detail and full-size drawings necessary in the judgment of the Supervising Architect, for the use of any contractor during the construction of said building.

And the party of the second part further covenant and agree to furnish to said superintendent of construction copies of all letters addressed by said party of the second part to contractors relating to work on said building at the time such letters are transmitted.

And the party of the second part further covenant and agree to furnish all drawings, details, specifications, estimates, etc., in such sequence and at such times as in the judgment of the Secretary of the Treasury may be necessary to insure the continuous prosecution of the work of construction under the several contracts, to be entered into therefor.

And the party of the second part further covenant and agree to locally supervise the work of erecting and completing said building in such manner as to secure from the contractors for the performance

of the different branches of the work the continuous and
16 expeditious prosecution of the work embraced in their respective contracts and the completion of all of the work on said building and its appurtenances within the times limited by the respective contracts therefor.

And the said party of the second part further covenant and agree that they will not make, authorize, or permit any deviations from the requirements of any contract entered into between the United States and any contractor for the execution of any work in connection with the erection of said building which will in any way diminish the structural strength of the building, or involve any difference in cost of construction, or diminish the value of work or material to be supplied, or be in any manner a departure from the spirit of the design, or which might form the basis of any claim on the part of any contractor for extra compensation; and that they will not make any alterations in the specifications, or drawings refererd to by number in and forming part of such contract; nor order or authorize any contractor for work on said building to perform any extra work or to change or omit any work or materials required by the drawings or specifications forming part of any such contract, without having previously obtained the written authority of the Secretary of the Treasury therefor.

And the party of the second part covenant and agree carefully to inspect all work and materials, and to reject any work or materials which may not be in strict accordance with the contracts under which the same are to be supplied; and in certifying vouchers of contractors for work or materials in place, to see that said vouchers in no case represent a sum in excess of the percentage of the actual value of the work in place and approved by said party of the second part which is stipulated and allowed by the particular contract for that portion of the work.

It is further covenanted and agreed by and between the parties hereto that the Supervising Architect of the Treasury Department and his agents and representatives shall at all times have free
17 access to said building during the course of its construction and be afforded unrestricted opportunity to examine and inspect all work and materials in connection with the same.

And the party of the first part covenants and agrees to pay, or cause to be paid, unto the party of the second part, or to the heirs, executors, or administrators of the party of the second part, a fee computed at the rate of five per centum upon the actual cost of the work executed from the drawings and specifications and under their supervision, as shown upon the books of the Supervising Architect's Office, by the net amounts of contracts awarded and proposals accepted for additions or deductions, but not including the cost of the site, or furniture, electric plant, gas or electric fixtures, mural painting, architects' fee, or the contingent expenses incident to the construction of said building set apart by the party of the first part.

And the party of the first part covenants and agrees that payments will be made in the following manner, viz: One-fifth of the fee when the preliminary drawings are completed and approved in the manner provided in said regulations; three-tenths of the fee when the general working drawings and specifications are completed and copies thereof delivered to the Supervising Architect, and the balance of the fee monthly upon the basis of payments for work performed and in place as of record upon the books of the Supervising Architect's Office, or as ascertained to be due to the several contractors who execute such work; provided, that until the actual cost of the work executed from the architects' drawings and specifications and under their supervision can be determined the monthly payments on account of the fee shall be computed upon the proposed cost of said building as estimated by the party of the second part, viz: One million two hundred seventy-seven thousand six hundred ($1,277,600) dollars—or as may be readjusted from time to time; and upon the completion of the building the entire fee shall be finally based upon and computed on the actual con-
18 struction cost of the work executed from the architect's drawings and specifications and under their supervision, as shown upon the books of the Supervising Architect's Office, exclusive of the cost of the items hereinbefore excepted.

And it is further covenanted and agreed by the parties hereto that the payments herein stipulated to be made by the party of the first part shall be in full compensation and payment of all charges for the full services of the party of the second part, and for all designs, plans, details, specifications, and changes therein (except as herein otherwise provided), and for all traveling, subsistence, contingent, and other expenses of the said party of the second part.

And it is further covenanted and agreed by and between the parties hereto that in case the said party of the second part through any cause become unable to complete the foregoing contract, or if the conduct of the said party of the second part is such that the interests of the United States are thereby likely to be placed in jeopardy, or if the said party of the second part violate any of the conditions or stipulations of this contract, the said Secretary of the Treasury, acting for and in behalf of the said party of the first part, shall have the right to revoke this contract, and the commission awarded hereunder, and to annul said contract, and to complete or cause to be completed said contract, using for that purpose all designs, plans, details, drawings, specifications, etc., which may have been prepared by the said party of the second part; provided in such case, however, that the party of the second part shall receive equitable compensation for all service properly performed under this contract up to the date of its revocation, such compensation to be fixed by the Secretary of the Treasury, upon the basis of the percentages herein provided for.

And the party of the first part covenants and agrees to provide at its expense a "superintendent of construction," who will act under

orders from the party of the first part as its local representative; but the presence of such superintendent of construction upon
19 the work shall not in any particular relieve said party of the second part from responsibility for the actual supervision of the work.

It is an express condition of this contract that no Member of or Delegate to Congress, or other persons whose name is not at this time disclosed, shall be admitted to any share in this contract, or to any benefit to arise therefrom; and it is further covenanted and agreed that this contract shall not be assigned.

In testimony whereof, the parties hereto have hereunto subscribed their names this sixth day of February, A. D. 1904.

L. M. SHAW,
Secretary of the Treasury.

CEK. JKT.

We hereby certify that this contract has been correctly prepared.

JAS. A. WETMORE,
Chief, Law & Records Division.
FRANCIS B. WHEATON,
Chief, Engineering & Drafting Division.
EAMES & YOUNG,
Contractors.

Witnesses to contractors' signature:
L. MITCHELL,
G. W. BRUEGGEMAN.

Exhibit "B" (continued).

Programme for a competition for the selection of an architect for a United States customhouse building, San Francisco, California. James Knox Taylor, Supervising Architect.

Programme of a competition for the selection of an architect for the United States customhouse building, San Francisco, California, in compliance with the act approved February 20th, 1893, and under the amended regulations approved by the Secretary of the Treasury February 24th, 1903, copies of which are hereto attached.

20 The cost of the building must not exceed $1,440,000, including the architect's fee, plumbing and gas piping, electric conduits and wiring, heating and ventilating apparatus, elevators and approaches, but exclusive of gas and electric fixtures.

Special attention is called to the above stated limit of cost, as the presentation of drawings which can not be estimated at rate of 60 cents per cubic foot (reckoned from a point nine feet below the basement floor to top of parapet) within the limit will place the plans out of competition.

The building must be of fireproof construction, the exterior to be of such material as each competitor deems best suited for the

execution of his design, and the interior to be finished generally in the same manner as a first-class office building.

The site of the building is shown by the accompanying plat. The old customhouse building is to be removed to afford space for the erection of the new structure, which must not at any point be nearer to the appraisers' stores building than 30 feet.

The principal front will be on Battery Street, and suitable entrances must be provided upon the several fronts according with the arrangements of the interior devised by the competing architect.

The accommodations desired can be obtained in a building of five office floors with space for the future growth of Government business, and the treatment may be liberal as to space and yet leave spare room divided into offices for future use.

As it is intended to place the heating apparatus in the adjoining appraisers' warehouse building, it is suggested that the basement, or lowest occupied floor, should be about two feet above the Battery Street curb.

The minimum accommodations required are set forth in a memorandum statement hereto attached. Space must be allowed throughout the building for lobbies, corridors, staircase halls, elevators, toilets for officers and for male and female employes. Spare space to be divided in the basement into storage rooms, and be arranged in the upper stories for usual office rooms.

21 The old customhouse building, which is to be removed from the side of the new building, has pile foundations (about one pile to each 2½ square feet of footings), and shows no cracks in the masonry; the south end of the building is now one inch lower than the north end. The appraisers' stores immediately adjoining is built upon a monolith of concrete five feet thick, and extending five feet outside the basement walls. This latter building shows some fine cracks in the walls, and the south end is now eleven inches lower than the north end.

Each design submitted shall consist of the following drawings only (no alternate designs will be considered) and shall be inclosed in a portfolio, or between stiff cardboard, and shall be securely wrapped, sealed, and addressed to the "Secretary of the Treasury, Washington, D. C.," and plainly and conspicuously marked with the name of the building under competition; and with no other marks whatever.

Plans of each floor, including basement, scale $\frac{1}{16}''$ to 1′.

Rendered elevation of Battery Street front, scale $\frac{1}{8}''$ to 1′.

Sketch elevation of rear and of one other street front, scale $\frac{1}{16}''$ to 1′.

Block section through building, showing heights of stories and the proportions of the most important rooms, scale $\frac{1}{16}''$ to 1′.

No perspective sketch will be received. Two drawings may be placed on each sheet if desired.

All drawings must be on Whatman paper, unmounted, sheets to be 26″ x 38″.

Battery Street elevation to be rendered in india ink wash, with shadows accurately cast, with the light falling at an angle of 45 degrees from the left side of the drawing.

One figure only may be shown on this rendered elevation to give scale.

22 Drawings to be titled "United States customhouse, San Francisco, California," with only such other words or figures as may be necessary to designate their parts, etc., all words or figures to be simple lettering, and not script or writing.

Inquiries for additional information must be made in writing only, and forwarded by mail to this office, and any answer or additional information given will be simultaneously communicated by mail to each competitor by circular letter, but no such information will be given after October 31st, 1903.

Designs must be delivered at this office not later than 2 p. m. Wednesday, December 16th, 1903.

A brief description of the building, typewritten or on plain legal cap, calling attention to any special points of the design, materials proposed, etc., must accompany the drawings.

An estimate of the cost must also be forwarded with this description and be in the following form:

Cubic contents of building.....feet
Exterior surface (gross) of all stone work.....sq. ft.
Estimated amount of contracts of all work necessary to complete the building, exclusive of any mural painting, electric plaint, gas and electric fixtures.
Architect's fee.....
Total.....

JAMES KNOX TAYLOR,
Supervising Architect.

L.S.

United States customhouse building, San Francisco, California, competition.

This information is furnished from official reports concerning the accommodations desired. The number of rooms and the area (minimum) stated should be provided for the following officials:

23 CUSTOMHOUSE.

Collector of customs (2 rooms with vault 4′x4′).....720 sq. ft.
Special deputy collector (1 room with vault 4′x4′).....360 sq. ft.
Chief clerk (1 room).....300 sq. ft.
Seizure clerk (2 rooms).....600 sq. ft.
Surveyor of customs (1 room with vault 4′x4′).....360 sq. ft.
Naval officer (1 room with vault 4′x4′).....360 sq. ft.
Collector's waiting or ante room.....360 sq. ft.

Collector's cashier (1 room with vault 4′x6′)----------400 sq. ft.
Naval cashier (1 room with vault 3′x6′)----------400 sq. ft.
Deputy collector 1st division (1 large room)----------2,500 sq. ft.
Deputy collector 2nd division (1 large room with vault 3′x6′)----------1,500 sq. ft.
Deputy surveyor and clerks (1 large room)----------2,000 sq. ft.
Deputy naval officer and clerks (1 large room)----------2,000 sq. ft.
Auditor (1 room)----------500 sq. ft.
Assistant auditor and clerks (1 room with vault 4′x6′)---1,200 sq. ft.
Adjuster of duties (liquidating department) 1 room-------400 sq. ft.
Liquidating clerks (1 room with vault 4′x8′)----------1,000 sq. ft.
Inspectors' room----------450 sq. ft.
Gaugers' room----------450 sq. ft.
Adjusting and sample rooms (2)----------700 sq. ft.
Chief weigher and clerks (1 room)----------500 sq. ft.
Assistant weighers (storeroom) (1)----------600 sq. ft.
Assistant weighers (1 room)----------600 sq. ft.
Laborers' swing room (1)----------600 sq. ft.
Supplies, stationery, blanks, etc----------600 sq. ft.

"The following offices should be on the same floor and adjacent: First and second divisions of deputy collectors; collector's cashier; naval office and naval office cashier. It is not essential that the deputy surveyor and his clerks be on the same floor, although it would be convenient to have it so."

"The first division and the naval office should adjoin, and if possible the collector's cashier and the naval cashier should adjoin, or be in close proximity to each other."

24 "The deputy collector, first division, should be provided with about 105 lineal feet of counter or screen; because nearly every clerk in this division must be adjacent the counter to transact business with the public; the second division with 55 or 60 lineal feet; the deputy naval officer and clerks, including the cashier with 60 lineal feet; the deputy surveyor and clerks with 30 lineal feet; the assistant auditor and clerks 25 to 30 feet; the liquidating clerks 20 lineal feet."

"The necessity for contiguity of certain offices can be clearly shown by stating the course of various papers in a custom transaction; take the matter of an entry of merchandise for consumption:"

"The entry in duplicate, with the invoices is presented in the first division, where, after the necessary calculations have been made, an additional paper (the permit) is placed in the entry. The entry, with the accompanying papers, then passes directly to the naval office. From there all papers pass to a deputy collector for declaration, examination order, etc., and where the invoices are taken out to be transmitted to the first division, and thence to appraiser. The papers then go to the bond clerk in first division, then to the collector's cashier, where one copy of the entry is retained. The other copy

of the entry and the permit then go to naval office cashier, who retains the entry. The permit is then taken to the deputy naval officer and thence to a deputy collector for signature, when it is ready for presentation to the outside officer to whom addressed."

"The copy of the entry left with the collector's cashier goes to auditor's office; thence to liquidating division; thence to naval office; thence back to liquidating division; thence (if additional duty is due the United States), to collector's cashier, and back again to liquidating division; or (if refund is due importer), to auditor and then back to liquidating division."

25 "All invoices go from deputy collectors to the first division (invoice desk), thence to appraiser, thence to liquidating division. As the appraiser is in another building, the invoice desk of first division, the appraiser's desk, and the liquidating division should be connected with pneumatic tubes; so also should the naval office and liquidating division. A great many papers pass from gauger to liquidating division, and from weigher to liquidating division, and pneumatic tubes should connect these offices."

"In entering and clearing vessels, papers pass from entrance and clearance clerks first division to deputy collector first division, thence to deputy naval officer, thence back to clerks in first division."

"Entries of merchandise for warehouse, for drawback, for export, withdrawals, for consumption, while differing slightly in the routine, emphasize the necessity for sequence as above suggested, if due regard be had to convenience."

"The auditor's office and the liquidating division should be adjacent, if possible, as papers are constantly passed between the two offices."

"The auditor's office should also, if practicable, be on the same floor as the collector's office, as all checks prepared by the former have to be sent by messenger for the latter's signature."

"It is considered very desirable for the chief clerk to be located between the collector or special deputy, and the collector's public waiting room. Briefly, if the collector's room, special deputy's room, room for chief clerk, auditing department, and liquidating division could be placed on the same floor in reason-' contiguity it would be a desirable arrangement."

Rooms for inspectors, gaugers, weighers, and laborers should be on floor near sidewalk level.

26 SUBTREASURY.

Assistant treasurer	400 sq. ft.
Chief clerk	320 sq. ft.
Business office with 60-ft. counter	4,000 sq. ft.
Daily working vault in office	300 sq. ft.
Coin storage vaults	2,000 sq. ft.

These vaults, if not on the same floor with subtreasury, should have connection with same by private staircase, and should be situ-

ated conveniently for receipt and shipment of coin by private entrance.

BRANCH POST OFFICE.

Branch post office (with vault 4′ x 10′)	2,400 sq. ft.

INTERNAL REVENUE.

Collector	400 sq. ft.
Deputy collector	400 sq. ft.
Stenographer	400 sq. ft.
Business office with 50-foot counter	1,800 sq. ft.
Clerks	600 sq. ft.
Agent	400 sq. ft.
Cashier's vault	100 sq. ft.
Stamp vault	300 sq. ft.
Laboratory (in top story)	400 sq. ft.

REVENUE-CUTTER SERVICE.

Three rooms in all	1,280 sq. ft.

LIGHTHOUSE ESTABLISHMENT.

Engineer officer (1 room)	500 sq. ft.
Clerks (1 room)	700 sq. ft.
Draughtsmen (1 room)	700 sq. ft.
Superintendent (1 room)	350 sq. ft.
Blue print room (1 room)	300 sq. ft.
Storage	500 sq. ft.
Lighthouse inspector (6 rooms) in all	1,625 sq. ft.

27

HARBOR FORTIFICATIONS.

Assistant engineer in charge (1 room)	400 sq. ft.
Clerks	800 sq. ft.
Draughtsmen	1,000 sq. ft.
Blue-print room	350 sq. ft.
Storage room	500 sq. ft.

These rooms should be adjacent to the Light House Establishment.

ENGINEERS, RIVERS AND HARBORS.

Engineers in charge (1 room)	400 sq. ft.
Clerks	600 sq. ft.
Draughtsmen	700 sq. ft.
Storage, etc	200 sq. ft.

COAST SURVEY.

Four rooms, in all	1,500 sq. ft.

SPECIAL AGENTS.

Three rooms, in all about	900 sq. ft.

CHINESE BUREAU.

Five rooms, in all	3,000 sq. ft.

WEATHER BUREAU.

Five rooms, in all	2,000 sq. ft.

FISH COMMISSION.

Office room	400 sq. ft.
One storage room	150 sq. ft.

LIFE-SAVING SERVICE.

Three rooms, in all	900 sq. ft.

28 STEAMBOAT-INSPECTION SERVICE.

Four room (400 sq. ft. each)	1,600 sq. ft.

CUSTODIAN'S FORCE (BASEMENT).

Janitor	200 sq. ft.
Laborers	200 sq. ft.
Storeroom	400 sq. ft.

STORAGE OF FILES (TOP STORY).

About	6,000 sq. ft.

L. S.

Exhibit "B" (continued).

Regulations (as amended February 24, 1903) for the enforcement of act approved February 20, 1893, to enable the Secretary of the Treasury to obtain, by competition among architects, designs and specifications for public buildings to be erected under the supervision of the Treasury Department.

Treasury Department,
Office of Supervising Architect,
Form No. 226.

Regulations, as amended February 24, 1903.

For the enforcement of the act approved February 20, 1893, to able the Secretary of the Treasury to obtain, by competition among architects, plans, drawings, and specifications for public buildings to be erected under the supervision of the Treasury Department.

By virtue of the authority contained in the act of Congress approved February 20, 1893, entitled "An act authorizing the
29 Secretary of the Treasury to obtain plans and specifications for public buildings to be erected under the supervision of the Treasury Department, and providing for local supervision of the construction of the same," the Secretary of the Treasury hereby declares his purpose to enforce said act with reference to such buildings as may be hereafter selected by him, subject to the following regulations:

COMPETITORS.

1. At least five architects of good professional standing, who are citizens of the United States, shall be invited by the Secretary of the Treasury to submit plans, drawings, and specifications in accordance with the conditions set forth in these regulations; and such plans, drawings, and specifications shall be passed upon as to merit by the commission herein provided for.

COMMISSION OF AWARD.

2. A commission shall be appointed by the Secretary of the Treasury consisting of the Supervising Architect of the Treasury Department, and four well-known architects, to judge and report to him as to the relative merit of the designs and plans submitted.

3. No member of the commission herein referred to shall have any interest whatever, direct or indirect, in any design submitted in the competition, or any association with, or employment by, any of the competitors; and no employee of the Treasury Department shall be allowed to enter any competition held under these regulations.

DATA FURNISHED.

4. The office of the Supervising Architect will furnish full data and information as to cost and general requirements of the buildings placed in competition under these regulations, and the successful architect will be awarded a commission to prepare complete
30 plans, drawings, and specifications, and to locally supervise the buildings won in any competition.

UNSUCCESSFUL COMPETITORS.

5. It must be understood that no claim shall be made upon the United States, by any unsuccessful competitor for any fee, percentage or payment whatever, or any expense incident to, or growing out of, his participation in the competition.

REJECTED DESIGNS.

6. The department agrees to make selection from the designs submitted if, in its opinion, one suitable in all respects as to design,

detail, and cost be submitted, but expressly reserves the right to reject any and all plans, designs, and specifications submitted, and to reopen the competition if, in the opinion of the commission herein referred to, or of the Secretary of the Treasury, no design suitable in all respects has been submitted.

MISCONDUCT.

7. It must be understood that a competitor will forfeit all privileges under these regulations who shall violate any of the conditions governing a competition, or who shall seek in any way, directly or indirectly, to gain advantage by influencing in his favor any of the commission.

COMPETITIVE DRAWINGS.

8. Each set of drawings, with its accompanying description, must be securely wrapped and sealed, and addressed to the "Secretary of the Treasury, Washington, D. C.," plainly and conspicuously marked with the name of the building under competition, and without any distinguishing mark or device which might disclose the identity of the competitor.

31 9. There must be inclosed with each set of drawings, etc., a plain, white, opague envelope, within which the competitor will place a card bearing his name and address. The envelope must be securely sealed with a plain wax seal having no impression, legend, device, or mark upon it which might disclose the identity of the competitor.

OPENING OF DRAWINGS.

10. Upon opening the packages containing the drawings, the commission will number the envelope containing the name and address of the competitor, and will place the same number upon each drawing, plan, specification, etc., submitted by him, and will preserve unopened the envelope containing such name and address until final selection shall be made.

FINDING OF COMMISSION.

11. The commission shall place out of competition any set of drawings as to which the conditions of these regulations have not been observed, and examine those remaining, giving to each the rank to which, in their judgment, its merit entitled it, and submit their findings to the Secretary of the Treasury.

FINAL SELECTION.

12. The selection of one of the designs by the Secretary of the Treasury, and its subsequent approval by him, the Postmaster General, and the Secretary of the Interior shall be final and conclusive.

SUCCESSFUL COMPETITOR MAY BE REJECTED.

13. In the event that the architect to whom the commission is awarded should prove to be an incompetent or improper person, the Secretary of the Treasury expressly reserves the right to re-
32 move him, to revoke the commission awarded him, and to annul the contract entered into with him; but such architect will receive equitable compensation for the work properly performed by him up to the time of his removal, to be fixed by the Secretary of the Treasury.

RETURN OF COMPETITIVE DRAWINGS.

14. Upon the award of the contract to the architect all designs of unsuccessful competitors will be returned to them, and no use will be made of any of the drawings not accepted, or of any part that may be original, without the consent of the author thereof.

DRAWINGS AFTER AWARD.

15. The architect to whom the commission is awarded shall revise his competitive drawings to meet the further requirements of the Secretary of the Treasury, and upon the basis of these revised preliminary drawings shall prepare full detailed working drawings and specifications for said building; and shall thereafter, from time to time, make such changes in the plans, drawings, and specifications as may be directed by the Secretary of the Treasury, for which just compensation shall be allowed; but no changes in the plans, drawings, and specifications shall be made without written authority from the Secretary of the Treasury.

16. Alterations in the working drawings and specifications which may be necessary to keep the cost of the building within the limit furnished by the Office of the Supervising Architect shall, when required by the Secretary of the Treasury, be made by the architect in charge at his own cost.

17. The architect is to provide for the use of the Treasury Department one set of tracings of all working drawings, one copy of the specifications, and one copy of detailed estimate of cost of entire building, which, with the competitive drawings or revised competitive drawings as may be necessary, shall remain in the custody
33 of the department, and to be and remain the property of the United States and not of the architect, but such drawings and specifications shall not be used for any other building. The Office of the Supervising Architect will furnish for the use of intending bidders all necessary duplications of plans and specifications. All detail and full-size drawings and sketches necessary for the use of the contractors during construction must be furnished by the architect, and copies supplied by him both to the contractors and the Government "superintendent of construction" at the building.

The architect shall also furnish the "superintendent of construction" with copies of all letters addressed by him to the contractors relative to the work.

ARCHITECT'S FEE.

18. The architect (or architects) to whom said commission shall be awarded will receive in compensation for full professional services, including local supervision of the building, a fee computed at the rate of 5 per cent upon the cost of the work executed from his drawings and specifications and under his superintendence. The sum upon which the architect's commission is to be computed shall be the actual construction cost of the building as ascertained from the net amount of contracts awarded and proposals accepted for additions or deductions.

19. The architect's commission shall be paid as the work progresses, in the following order:

One-fifth of fee when preliminary drawings are completed and approved in the manner herein provided; three-tenths of fee when general working drawings and specifications are completed and copies delivered to the Supervising Architect; and balance of percentage monthly upon the basis of payments for work performed as of record on the books of the office of the Supervising Architect.

20. Until the actual cost of the building can be determined the fee of the architect will be based upon the proposed cost of
34 the work as above indicated, or as may be readjusted from time to time, and will be paid as installments of the entire fee, which will be finally computed as per paragraph No. 18.

21. The compensation herein stipulated to be paid to said architect shall be in full payment of all charges for his full services, inclusive of all traveling and other expenses necessary to his proper superintendence of the work. Expenses incurred in traveling under orders from the department may be reimbursed on approval of the Secretary of the Treasury.

WORK NOT INCLUDED.

22. The services of the architect will noot be required or paid for, in connection with the supply of furniture, gas, or electric fixtures, or electric light plants, unless specially ordered in writing by the department.

GOVERNMENT SUPERINTENDENT OF CONSTRUCTION.

23. The department will appoint and maintain on the work as its local representative a "superintendent of construction." This officer will act under orders from the department and solely as its representative, and not at all as the representative of the architect in charge, who will not be relieved in any particular from his re-

sponsibility for the actual superintendence of the work by the presence of the "superintendent of construction," who will not give orders to contractors or their employees.

ARCHITECT'S CERTIFICATE OF WORK DONE.

24. Payments upon the work of construction under contract will be made upon vouchers certified by the architect in charge and countersigned by the "superintendent of construction" representing the United States Government, which will be paid by a disbursing officer appointed by the Secretary of the Treasury.

35 CONTRACTS FOR CONSTRUCTION.

25. The Supervising Architect of the Treasury Department will receive the proposals for contracts to be awarded, and shall likewise determine the manner in which the various branches of the work are to be contracted for.

26. All further details necessary properly to carry out these regulations may be arranged by the Supervising Architect from time to time, provided they do not conflict herewith.

27. The foregoing regulations shall be subject to modification and change at the pleasure of the Secretary of the Treasury. July 3, 1897.

As amended February 24, 1903.

LESLIE M. SHAW,
Secretary of the Treasury.

Enclosure 2254. Low.

Exhibit "B" (continued).

Lou
1054

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, Dec. 19, 1903.

In replying to this letter the initials in upper right-hand corner must be referred to.

(Enclosure 2254.)
Messrs. EAMES & YOUNG,
Architects, Lincoln Trust Building, St. Louis, Missouri.

GENTLEMEN: I have to advise you that the report made
36 by the commission selected to judge the designs for the United States customhouse building, San Francisco, California, gave first place to design numbered 4, and upon opening the envelope so marked it appeared that the same had been submitted by you. The

report of the commission having been formally approved, you are hereby selected as architects for the said building.

You will be further advised as to carrying out the work involved.

Copy of the report of the commission is herewith enclosed.

Respectfully,

(Signed) H. A. TAYLOR,
Acting Secretary.

Exhibit "B" (continued).

FBW

OFFICE OF SUPERVISING ARCHITECT,
TREASURY DEPARTMENT,
Washington, February 4, 1904.

In replying quote upper initial, right-hand corner.
Forwarding.

MESSRS. EAMES & YOUNG,
Lincoln Trust Building, St. Louis, Missouri.

GENTLEMEN: There has been forwarded this day under separate cover a set of prints as follows:

M—6A, Screen.
M—7, Boxes,
M—12, Vault linings,
M—32, Vault doors,
M—38, Vent ducts,
M—40, Plumbing,
M—43, Electric cabinets,

which are intended for your guidance in the preparation of
37 the working drawings for the customhouse building, San Francisco, California, for which you are the architects.

The tracing prepared by you should not exceed 3′ 2″ x 2′ 1″ in size, this requirement being necessary in order to facilitate the preparation of prints.

There is also forwarded a rubber stamp which you are to use in stamping all drawings made by you for the above mentioned building before same are sent out. The stamp should be placed on the lower left hand corner of each sheet, and all blanks properly filled in. You should begin with No. 6, the five sheets of competitive drawings having been given Nos. E.Y. 1 to E.Y. 5, inclusive.

Respectfully,

(Signed) J. K. TAYLOR,
Supervising Architect.

M.

Exhibit "B" (continued).

SAN FRANCISCO, CAL. FBW

TREASURY DEPARTMENT, JAW
OFFICE OF THE SECRETARY, JCP
Washington, February 4, 1904.

In replying to this letter the initials in upper right-hand corner must be referred to.
W.W.S.

Messrs. EAMES & YOUNG,
Lincoln Trust Building, St. Louis, Missouri.

GENTLEMEN: I have to advise you that your competitive design for the customhouse building, San Francisco, California, has been formally approved, as provided by section 14 of the regulations,
38 promulgated July 3rd, 1897, and these drawings, which form a part of your contract, have been given Nos. E.Y. 1 to E.Y. 5, inclusive, and will be retained on the files of the Supervising Architect as a part of the records thereof.

You are now at liberty to proceed with the preparation of the working drawings, and a contract covering this work will be forwarded to you in a few days.

Respectfully,

(Signed) H. A. TAYLOR,
Acting Secretary.

II. Substitution of attorneys.

On January 31, 1917, Messrs. Harr & Bates were substituted as attorneys of record, in place of Cleveland A. Newton, Esq., by virtue of a power of attorney from the claimant and power of substitution from Cleveland A. Newton, Esq., former attorney.

III. General traverse.

No demurrer, plea, answer, counterclaim, setoff, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by rule 34.

39 *IV. Argument and submission of case.*

On February 17, 1920, this case was argued and submitted by Mr. William R. Harr, for the claimants, and by Mr. Richard P. Whiteley, for the defendants.

V. Findings of fact, conclusion of law, opinion of the court by Hay, J., concurred in by Graham, J., and concurring opinion by Booth, J.; dissenting opinion by Downey, J., concurred in by Campbell, Ch. J. Entered March 15, 1920.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact.

I.

At all times mentioned herein and until March 5, 1915, William Sylvester Eames and Thomas Crane Young were members of a partnership known by the firm name of Eames & Young, with offices in the city of St. Louis and State of Missouri, engaged in business as architects. Said William Sylvester Eames died on said 5th day of March, 1915, and on March 8, 1915, Claimant Isaac T. Cook was, by the probate court of the city of St. Louis and State of Missouri, duly appointed as the executor of his last will and testament.

II.

On July 9, 1903, the United States, acting through its Treasury Department, by letter of the Acting Secretary of the Treasury of that date, submitted to the said firm of Eames & Young a certain program for a competition for the selection of an architect for the erection of a United States customhouse building at San Francisco, California, and invited said firm to submit to the Treasury Department, in conformity with said program and in competition with eleven other architects, a design for such United States customhouse. Pursuant to such invitation, Eames & Young submitted to the Treasury Department plans, drawings, specifications, and estimates for the erection of the customhouse at San Francisco, which plans, drawings, specifications, and estimates were approved by the Treasury Department, and Eames & Young were duly selected on the 19th day of December, 1903, as architects for said building, by letter of the Acting Secretary of the Treasury of said date.

40 III.

On the 6th day of February, 1904, the defendant, through its Treasury Department, entered into a contract with said firm of Eames & Young, a true copy of which contract and of the letters, Program of Competition and Regulations of the Treasury Department, referred to therein and expressly made a part thereof is attached to plaintiff's petition marked "Exhibit B," and is made a part hereof by reference.

IV.

Said firm of Eames & Young, in accordance with said contract, prepared detailed plans, working drawings, designs, specifications, and estimates for said customhouse at San Francisco, and locally supervised the erection thereof and otherwise fully complied with all of the terms and provisions of said contract.

The contract for the erection of said building was let to Thomas Butler at the contract price of $1,194,000. The building was completed January 16, 1911, except some "odds and ends" such as exterior carving of stone and statuary and buttresses for the main staircase. The architect's services were finally terminated in February, 1913, and voucher in final settlement was paid on March 8, 1913.

V.

In said program for competition, made a part of the contract between the parties as aforesaid, the Treasury Department required that provision be made by the architects for the location in said customhouse building of a subtreasury, by the following provision of said program:

SUBTREASURY.

Assistant treasurer	400 sq. ft.
Chief clerk	320 sq. ft.
Business office with 60-ft. counter	4,000 sq. ft.
Daily working vault in office	360 sq. ft.
Coin storage vaults	2,000 sq. ft.

"These vaults, if not on the same floor with subtreasury, should have connection with same by private staircase and should be situated conveniently for receipt and shipment of coin by private entrance."

Pursuant to said requirement, said firm of Eames & Young in their competitive design which was accepted and approved by the defendant, and in the detached plans, working drawings, designs, and specifications which they prepared for said customhouse subsequent to the execution of said contract and which were also accepted and approved by defendant, provided for the space called for by said program and said contract to be used as such subtreasury.

Work on the construction of the building as so designed was begun the latter part of August, 1905.

About one year later, to wit, on August 18, 1906, the Treasury Department changed its intention with respect to providing space for a subtreasury in said customhouse building and determined to erect a separate building in San Francisco for such subtreasury, and the department thereupon in writing required the said firm of
41 Eames & Young, as such architects, to so change the plans, drawings, specifications, etc., which it had theretofore ap-

proved for said customhouse building as to eliminate therefrom the said provisions for said subtreasury.

Said changes involved additional and extra work not required for the completion of the building according to the plans, designs, specifications, and drawings accepted by the defendant and not required to insure its proper construction and completion within the limit of its cost as provided in said contract.

Said firm of Eames & Young, complying with said requirement, did so change said plans, designs, specifications, etc., as to eliminate the space theretofore provided for such subtreasury, which changes were approved by the defendant. In so doing the said firm of Eames & Young performed extra work of the reasonable value of $1,200.

VI.

The regulations of the Treasury Department expressly made a part of the contract between the parties provided:

"22. The services of the architect will not be required or paid for in connection with the supply of furniture, gas, or electric fixtures, or electric-light plants, unless separately ordered by the department.

"15. The architect to whom the commission is awarded shall revise his competitive drawings to meet the further requirements of the Secretary of the Treasury, and upon the basis of these revised preliminary drawings shall prepare full detailed working drawings and specifications for said building; and shall thereinafter, from time to time, make such changes in the plans, drawings, and specifications as may be directed by the Secretary of the Treasury, for which just compensation shall be allowed; but no changes in the plans, drawings, and specifications shall be made without written authority from the Secretary of the Treasury."

The program of competition stated the intention of the Government to put the heating apparatus in the adjoining appraiser's warehouse building.

The contract between the parties expressly excluded, among other things, "furniture, electric plant, gas, or electric fixtures" from consideration in computing the architect's fee.

Plaintiffs were required under their contract to provide for all the apparatus for heat and light situated in the customs building, exclusive of gas and electric fixtures, but were directed to stop their work at the alley separating the customhouse from the appraiser's warehouse building.

Plaintiffs had personal conversations with the Supervising Architect in Washington, in which he explained verbally that this building across the alley contained boilers and space that they expected to utilize for the purpose of heating the customs building, and the Treasury Department's intention was to make its own electricity, and planned to connect up with the work of the customs building. But the Supervising Architect said that that was not a part of the archi-

tect's contract, and he did not know whether they would be asked to do it or not; but that was in the future. All the architects had to do was to provide the necessary apparatus up to that point; that the Treasury Department would take care of the rest.

42 After the execution of the said contract between the parties and subsequent to the approval of the architect's plans, specifications, and drawings, and while the execution of the work was in progress plaintiffs received the following letter from the Supervising Architect of the Treasury:

"TREASURY DEPARTMENT,
"OFFICE SUPERVISING ARCHITECT,
"*May 1, 1908.*

"Referred to the Messrs. Eames & Young, Archt's, for his guidance and files. J. K. TAYLOR, *Supervising Architect.*

"THE SUPERINTENDENT OF CONSTRUCTION,
"*U. S. Customhouse, San Francisco, Cal.*

"SIR: Referring to your letter of the 23rd ultimo relative to plan and specifications for mechanical equipment of the building for which you are superintendent, you are advised that an act of Congress making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1907, and for other purposes, states:

"'The appropriations heretofore made or which may hereafter be made for the construction of the customhouse building at San Francisco, Cal., are hereby made available for installing in the appraisers' stores building adjacent thereto the necessary machinery, appliances, and fixtures for supplying heat, light, or power to the customhouse building, including all necessary incidental changes in the present heating and power plant, appliances, and fixtures in the appraisers' stores building.'

"It is therefore the province of the architects, Messrs. Eames & Young, to prepare the drawings and specifications for that part of the mechanical equipment of the U. S. customhouse which is to be located in the basement of the U. S. appraisers' stores, as well as for any modifications in the mechanical equipment of the latter building which are incident thereto.

"The matter of dampness in basement of U. S. appraisers' stores referred to in your letter should be taken up with the architects, to whom a copy of this letter will be sent.

"Respectfully,

"SUPERVISING ARCHITECT."

Acting upon these instructions, plaintiffs employed an engineer at San Francisco, upon the recommendation of the Government, to draw up the necessary plans and specifications for the reconstruction of the boiler plant on the old appraisers' stores building so as to enable it to supply heat, light, and power to the new customhouse building. This work required a great many changes in the ap-

praisers' stores building itself besides in the actual power plant. In the instructions received by plaintiffs as to this work, there was no limitation placed upon the cost of the power plant. It was plaintiffs' understanding that an independent appropriation was to be made for this work, and that the work had nothing to do with the appropriation for the customhouse at that time.

Plaintiffs paid the San Francisco engineer $1,200 for drawing up said plans and specifications. Said plans and specifications were rejected by the Treasury Department as not complying with Government practices.

43 Plaintiffs then prepared new plans and specifications themselves, in so doing complying with certain changes requested by the Government which increased the cost of the proposed power plant.

Plaintiffs then submitted their completed plans and specifications for this power plant to the Treasury Department; whereupon the latter called for an estimate of cost, which plaintiffs gave, the same being fixed by them at $109,800.

Subsequent to the submission of said estimate of cost and about nine months thereafter, plaintiffs' said new plans and specifications for the power plant were approved by the Treasury Department.

After the approval of the plans and specifications plaintiffs took proposals for the work, the cost aggregate proposed being $109,947.

Thereafter the Treasury Department decided to abandon the proposed power plant entirely and instructed plaintiffs to draw up new plans leaving out the power plant (which was intended to manufacture the electricity for the building), as the department had concluded to buy the electric current from the city company and thus reduce the cost of the building.

This change of plan on the part of the Treasury Department rendered the plans and specifications prepared by plaintiffs for the installation of the power plant in the old appraisers' stores building useless.

The customary charge by architects and builders of the country for such drawings and specifications and the work necessary to the letting of the contracts, such as was done by claimants in this instance, is two and a half ($2\frac{1}{2}$) per cent of the cost of the work.

It was not until the receipt of a letter from the Supervising Architect of the Treasury Department dated January 29, 1910, that plaintiffs were advised that the work in respect to the power plant would have to be brought within the limit of the appropriation for the new customhouse building.

This was about a year after the plans had been approved and they had submitted their estimate of cost for such work.

Under date of April 21, 1910, plaintiffs wrote the Supervising Architect of the Treasury requesting to be advised whether they would be allowed the usual commission of two and a half ($2\frac{1}{2}$) per cent on the sum of $109,937 on account of the said rejected work in

connection with the proposed power plant in the appraisers' building, but their request was denied.

The reasonable value of the work so performed is the sum of $2,725.

VII.

The architects' fee, as finally calculated by the Treasury Department, was based upon the construction cost of the customs house as shown upon the books of the Supervising Architect's Office, Treasury Department, exclusive of the sum of $101,907.66, also shown upon the books of the Supervising Architect's Office. The books in the Supervising Architect's Office contained an account with the building contractor in usual form in which the first item states the contract price. Following are items of additions because of authorized changes and of deductions and payments which are totaled and balanced at $1,222,206, the amount found to have accrued to the contractor under the contract. Following this account are fur-
44 ther entries the first of which, under date of May 27, 1908, states the authorization under the act hereinafter quoted, with a reference to said act, $250,000, as against which there are entered the payments made to the contractor amounting to said sum of $104,404.74. Said last-named payments were made pursuant to the sundry civil appropriation act of Congress of May 27, 1908, which provided:

"San Francisco, California, customhouse: The Secretary of the Treasury is authorized, upon the completion of the customhouse in the city of San Francisco, California, to pay to Thomas Butler, the contractor for the construction of said building, in addition to the contract price therefor, such sum as may be equitable and just to reimburse said contractor for any loss actually sustained in consequence of the earthquake and great fire of April, nineteen hundred and six, not exceeding the sum of two hundred and fifty thousand dollars: Provided, That the amount allowed said Thomas Butler shall not be sufficient to enable him to make any profit out of the making and execution of said contract."

The report of the committee appointed by the Secretary of the Treasury to adjust said claim of Thomas Butler shows that said additional payment covered only the actual increase cost to the contractor of constructing said building due to the earthquake and fire of 1906, exclusive of any profits to the contractor. Said report also shows that said increased cost was due to the increased cost of labor and material caused by the earthquake and to the delay caused thereby in completing the building.

Owing to said earthquake and fire at San Francisco in 1906, there was a delay of about three years in the completion of the customs house and it was necessary for the architects, under their contract, to keep a superintendent of construction on the building for that

further length of time at a cost of about $6,700; also during this period and as a result of the delay the office and certain contingent expenses of the architect went on.

The architects were paid 5 per cent on $1,366,215.37, amounting to $68,310.77, all of which except $39.88 had been paid before final settlement, that sum being paid March 8, 1913, upon a voucher certified by T. E. Young, a member of the firm, for Eames & Young as correct and just. The above amount upon which they were paid commission was the amount found to have accrued to Contractor Butler under the contract, and certain other amounts paid to other contractors for parts of the work not included in Butler's contract but did not include said sum of $101,907.66.

Five per cent of $101,907.66 amounts to the sum of $5,095.38.

VIII.

At the instance of Eames and Young, there was introduced in the House of Representatives of the United States on the 5th of July, 1913, H. R. 6654 (entitled "A bill for the relief of William S. Eames and Thomas C. Young." Said bill provided for the payment by the Secretary of the Treasury to said Eames and Young of the sum of $21,244.86—

"for the reimbursement of said William S. Eames and Thomas C. Young for preparing extra plans and specifications for a power plant and for money paid by them in salaries and office expenses and for personal services during the construction of said building, the same being an extraordinary expense occasioned by the earthquake and fire in San Francisco, Calif., in April, 1906, in that the earthquake and the additional work made necessary by it made necessary a much more protracted employment of said superintendents and office force and greater personal effort than would have been necessary if the work had proceeded to completion under normal conditions and without the intervention of the earthquake."

Said bill was referred to the Committee on Claims, a subcommittee was appointed to consider the same and a hearing was had by said subcommittee before which Thomas C. Young appeared and testified. Said Eames and Young also filed with said subcommittee a printed brief in which, among other things, they made claim for the amounts herein sued for and which brief concluded as follows:

"In conclusion, said architects contend that since the bulk of their damages resulted from an act of God, for which they were in no way responsible, and which they could not foresee, Congress should, as a matter of equity and justice, relieve them. And that, inasmuch as Congress has relieved the said Thomas Butler for damages resulting from the same cause, it can not with fairness reject their claims.

"Said architects further contend that their claim for $18,700 on account of the delay occasioned by the earthquake and fire, their claim for $1,200 on account of the change in the intention of the Treasury Department regarding a subtreasury, their claim for

$2,544.86 on account of the money actually expended in the preparation of drawings and specifications for an electric or power plant which the Government rejected after bids had been received, and their claim for $5,095.38, constituting 5 per cent upon the additional sum paid to Thomas Butler, are just and reasonable claims and that Congress should give them relief in the total sum of $27,540.24."

On June 8, 1914, the Committee on Claims reported the bill with amendments, said amended bill providing for the payment to said Eames and Young of $2,544.86 "for the reimbursement of said William S. Eames and Thomas C. Young for actual expenses incurred by them in preparing extra plans and specifications for a power plant for said building." Said amended bill was committed to the Committee of the Whole House, but no action had been had thereon when the Sixty-third Congress expired.

On June 4, 1916, there was introduced in the House of Representatives of the United States, H. R. 7155, entitled "A bill for the relief of William S. Eames and Thomas C. Young," providing for the payment to them by the Secretary of the Treasury of the sum of $17,344.20 for the same assigned reasons as were stated in H. R. 6654, with the addition thereto of the following language:

"And to cover a 5 per cent commission on the sum of $101,907.66, paid by the Secretary of the Treasury, under authority of law, to Thomas Butler, contractor for said building, on account of damages sustained by him on account of such earthquake and fire."

On May 11, 1916, there was introduced in the House of Representatives a resolution referring said last-mentioned bill with the accompanying papers to the Court of Claims for the findings of fact and conclusions of law. Said resolution was pending on the calendar of the House when this action was commenced on the 12th day of January, 1917.

Conclusion of law.

Upon the foregoing findings of fact, the court decides, as a conclusion of law, that the plaintiffs are entitled to recover the sum
46 of $9,020.38 as shown by Findings V, VI, and VII. It is therefore adjudged and ordered that the plaintiffs recover of and from the United States the sum of nine thousand twenty dollars and thirty-eight cents ($9,020.38).

Opinion.

HAY, Judge, delivered the opinion of the court:

This is a suit brought by Isaac T. Cook, executor of the estate of William S. Eames, deceased, and Thomas C. Young, the said Eames and Young having been partners, who, at the time of the making of the contract hereinafter mentioned, were partners, engaged in business as architects in the city of St. Louis in the State of Missouri. On July 9, 1903, the United States submitted to Eames & Young a certain program for a competition for the selection of an architect

for the erection of a customhouse building at San Francisco, Calif., and invited said firm to submit a design and estimates for the erection of said building, which were approved by the Treasury Department, and the said firm was selected on December 19, 1903, as architects for said building. On February 6, 1904, the defendants entered into a contract with said firm. The plaintiffs performed extra work in eliminating from the original plans and specifications prepared by the plaintiffs and approved by the Treasury Department space for a subtreasury in said customhouse which was called for in the original program for competition by the Government and made part of the contract. For this extra work the defendants refused to pay. It was reasonably worth the sum of $1,200.

The said firm prepared plans and specifications for the installation of the power plant in the old appraiser's stores building, which was work not included under the contract, and the architects were not required to do it; it was work separately ordered by the department, and the reasonable value of the work so performed is the sum of $2,725. The third item of the claim is for the unpaid commission on the sum of $104,404.74 paid to Thomas Butler, the contractor for the construction of the building, due to the great earthquake and fire in San Francisco on April 18, 1906.

As to the first two items of this claim the defendants concede that they should be paid. The defendants resist the payment of the commission on the sum of $104,404.74, which was paid to Thomas Butler under the authority of a provision in the sundry civil appropriation act approved May 27, 1908, 35 Stat., 318. This provision is as follows:

"The Secretary of the Treasury is authorized, upon completion of the customhouse of San Francisco, California, to pay to Thomas Butler, the contractor for the construction of said building, in addition to the contract price thereof, such sum as may be equitable and just to reimburse said contractor for any loss actually sustained in consequence of the earthquake and great fire of April, 1906, not exceeding the sum of $250,000. Providing that the amount allowed said Thomas Butler shall not be sufficient to enable him to make any profit out of the making and executing of said contract."

The report of the committee appointed by the Secretary of the Treasury to adjust the claim of the contractor under the pro-
47 visions of the statute above quoted shows that the contractor was entitled to receive the sum of $104,404.74, and that this additional payment covered only the actual increased cost to the contractor of constructing said building due to the earthquake and fire of 1906, exclusive of any profits to the contractor.

The contract of the defendants with the architects provided:

"And the party of the first part covenants and agrees to pay, or cause to be paid, until the party of the second part, or to the heirs, executors, or administrators of the party of the second part, a fee computed at the rate of five per centum upon the actual cost of

the work executed from the drawings and specifications and under their supervision, as shown upon the books of the Supervising Architect's Office, by the net amounts of contracts awarded and proposals accepted for additions and deductions, but not including the cost of the site, or furniture, electric plant, gas or electric fixtures, mural painting, architects' fee, or the contingent expenses incident to the construction of said building set apart by the party of the first part.

"And the party of the first part covenants and agrees that payments will be made in the following manner, viz: One-fifth of the fee when the preliminary drawings are completed and approved in the manner provided in said regulations; three-tenths of the fee when the general working drawings and specifications are completed and copies thereof delivered to the Supervising Architect; and the balance of the fee monthly upon the basis of payments for work performed and in place as of record upon the books of the Supervising Architect's Office, or as ascertained to be due to the several contractors who execute such work: *Provided*, That until the actual cost of the work executed from the architect's drawings and specifications and under their supervision can be determined, the monthly payments on account of the fee shall be computed upon the proposed cost of said building as estimated by the party of the second part, viz, one million two hundred seventy-seven thousand six hundred ($1,277,600) dollars, or as may be readjusted from time to time; and upon the completion of the building the entire fee shall be finally based upon and computed on the actual construction cost of the work executed from the architect's drawings and specifications and under their supervision, as shown upon the books of the Supervising Architect's Office, exclusive of the cost of the items hereinbefore excepted."

It will be observed that this contract provides "upon the completion of the building the entire fee shall be finally based upon and computed on the actual construction cost of the work executed from the architect's drawings and specifications and under their supervision, as shown upon the books of the Supervising Architect's Office, exclusive of the cost of the items hereinbefore excepted." The $104,404.74 upon which the plaintiffs claim that they are entitled to commission is a part of the construction cost of the work executed from the architect's drawings and specifications, and the sum aforesaid was shown upon the books of the Supervising Architect's Office. Under the contract they are entitled to be paid their commission on this sum.

Judgment will be entered for the plaintiffs in the sum of $9,020.38.

Graham, Judge, concurs.

48 BOOTH, Judge, concurring:

The terms of the contract wherein provisions are made for the architects' fees clearly indicate an intent to meet the circumstances of the architects' employment and their relation to the contract work. It is first provided that the architects' fees shall be five per cent, to be ascertained from the net amount of contracts awarded. This is fol-

lowed directly by a provision for a preliminary payment of one-half of this fee upon the completion of the drawings and specifications. There was a manifest purpose for making it so, for if the building was never completed the architects nevertheless were to be paid this preliminary sum. One-fifth of the fees was to be paid when the preliminary drawings were completed. At this time no contract for the building had been let. It could not be let until the preliminary plans and specifications had been first provided by the architects. Therefore, as a basis for determining how much the two and one-half per centum would amount to in gross, reference was provided for to the contracts for the building of the structure. If the building had never thereafter been built, this two and one-half per centum would have been paid. This was one contingency which had to be met, and was so met by these preliminary provisions in the contract. Again, the contract provides for another contingency—i. e., for monthly payments of the remaining two and one-half per centum upon the basis of the limit of cost, viz, $1,277,600, not the contract cost, and this shall continue to be the basis of monthly payments to be made to the architects "until the actual cost of the work executed from the architects' drawings can be determined." Up to this point the contract is dealing with known and existent conditions, contingent because of the very nature of the services to be rendered by the plaintiffs and which must be provided for in justice to the architects. There comes a time, however, when all contingencies and conditions respecting the payment for the services of the architects are merged into an absolute certainty, and that time is when the work is completed and the actual cost of the the building capable of definite ascertainment. So it was provided in the contract that upon the completion of the building the entire fee should finally rest upon the actual construction cost of the building. No mention is made in the final paragraph of contract cost, and inasmuch as the terms of the contract expressly cover every stage of construction progress, it seems to be a contract to pay the architects in the end five per centum of the actual cost of the building as shown on the books of the Supervising Architect's Office. This is the usual and customary fee paid to architects, and the provision of the contract respecting the same accord with the general and long-continued practices respecting contracts for the payment of the same. Supposing that in this case the officers of the Government had concluded to do a vast amount of work by day labor, which might have been done if a sufficient margin obtained between the limit of cost and contract price. Would it then be said that the cost of such work was not to be included in the computation of actual cost of the building, so as to form a basis for the allowance of plaintiffs' fees? No written contract would have existed, but surely the item would be actual cost. The sum allowed by act of Congress to Butler, the contractor, was not a gratuity; quite the contrary—it was based
49 on precise estimates made after personal inspection and certified to as items of actual construction work. It was in legal

effect an increase in the limit of cost, and in the end made the building actually cost $1,382,004.74, whereas originally it was designed to limit the cost to $1,277,600. Certainly, the mere fact that Butler might not have recovered this amount in court does not convert the sum allowed as actual cost into a gratuity. Congress every session sends many controversies to this court by special jurisdictional acts, where the claimants are barred from judicial proceedings otherwise. In this instance instead of waiving legal defenses in a court of justice, Congress referred the matter to the proper department of the Government to investigate and determine the sum to be paid not in excess of the amount expressly limited in the bill. It did not give Butler any fixed sum.

Section 159 of the Judicial Code, providing for a statement in the petition of claimant "of the action thereon in Congress," is the continuation of an ancient provision appearing in the act of February 24, 1855, establishing this court. It was at the time an indispensable prerequisite, for the jurisdiction of the court embraced all claims "which may be referred to said court by either House of Congress." We were at the time a commission, possessing no general jurisdiction. It was manifestly carried into the Judicial Code because of our jurisdiction under the Bowman and Tucker Acts, wherein congressional and departmental action upon the claim preferred is a vital and necessary prerequisite. It can have no possible relation to general jurisdictional cases, and can not be held to be even a necessary allegation in a petition filed under our general jurisdictional laws and should not be in the findings. It was never required in other cases. The right of petition to Congress for relief is constitutional, and the fact that Congress acted adversely upon a petition so made can not affect the rights of the plaintiffs in a subsequent legal proceeding to recover under the law what Congress in its legislative judgment saw fit to deny them. The plaintiffs' case is not to be prejudiced because they in the first instance availed themselves of a constitutional right instead of resorting to the courts. Whatever argument they advanced, either in person or by attorney, in an effort to obtain congressional relief can not militate against them in the present suit, properly brought under an act giving this court jurisdiction of the subject matter. Previous statements as to matters of fact, of course, are available to impeach contrary ones on the cross-examination of witnesses, but whatever may have been the arguments advanced to persuade Congress to pass the bill and grant the relief requested have no place in this record, for this is not a congressional case. The plaintiffs may have been mistaken as to their legal rights or wrongly advised with respect thereto; they may have changed their minds, and whatever may have been the previous attitude in their course before Congress, save as to material statements of actual facts going to the truth or falsity of the actual situation as it existed, they are not to be prejudiced thereby.

I therefore concur in the opinion of the court.

DOWNEY, Judge, dissenting:

I dissent from so much of the conclusion of the court as includes in the judgment the item of $5,220.23 as architect's commission on the sum of $104,404.74 paid to the building contractor under authority of the act of May 27, 1908, quoted in Finding VII. I am of the opinion that the last-named amount is not properly to be included in the "actual construction cost of the work * * * as shown upon the books of the Supervising Architect's Office," and the determination of the questions necessarily involves a construction of the contract in that regard.

The view of the court as to this item is evidently found in the statement that "the $104,404.74 upon which the plaintiffs' claim that they are entitled to commission is a part of the construction cost of the work executed from the architect's drawings and specifications, and the sum aforesaid was shown upon the books of the Supervising Architect's office."

It is first provided in the contract that the architects shall be paid "a fee computed at the rate of 5 per cent upon the actual cost of the work executed from the drawings and specifications and under their supervision, as shown upon the books of the Supervising Architect's Office by the net amounts of contracts awarded and proposals accepted for additions and deductions, but not including, etc.," and after providing for partial payments on a stated basis it is finally provided that "upon completion of the building the entire fee shall be finally based upon and computed on the actual construction cost of the work * * * as shown upon the books of the Supervising Architect's Office, exclusive, etc."

In the first provision quoted are significant words with reference to the cost of the work as shown upon the Supervising Architect's books and illuminating as a reason for the use of the books as a basis for determining the amount upon which the fee is to be computed. I refer to the words "additions or deductions" in the connection used.

If it could be known that the work could and would be completed at the contract price the amount of the fee could be accurately stated in the contract but we know that in all building contracts there are provisions for additions and alterations. There were many of them in this case. Alterations sometimes involve additional compensation to the contractor and they sometimes involve deduction. Both are provided for in public building contracts. Hence the necessity for an account of "additions or deductions." The account first sets up, as shown by the findings in this case, the contract price. When the additions by reason of changes are added and the deductions subtracted the result is the net contract cost. The account also involves payments made but that is a matter with which the building contractor is concerned and not the architects.

When the result stated is reached by a balancing of the books we have the "actual cost of the work" as it is stated in one place, or the "actual construction cost of the work" as stated in another place, under the contract, and in my judgment the language used in the architect's contract with reference to actual cost must of necessity be construed to mean actual cost to the United States under the contract. I can not conceive of any other authorized construction. Cost to the contractor and cost to the United States under the contract were, of course, expected to be different. The difference expected in favor of
51 the contractor represented his anticipated profits. If Congress had not seen fit to relieve this unfortunate building contractor no other construction of the architect's contract than that stated would even have been suggested. It was made in contemplation of the erection of a building in the usual manner, taking into account the changes likely to be made during construction, and without anticipation of any special favors at the hands of Congress. The architects were, in fact, paid a percentage, as shown in the findings, on a sum considerably in excess of the amount shown to have accrued to Butler under his contract, but this was due to the fact that some lesser portions of the work were let to other contractors and the right of the architects to commission on the amount of such contracts was recognized.

It is to be inferred from what is said on the subject that this item would not have been included in the judgment authorized by the majority of the court had not the extra payment made to the contractor under the special act quoted been entered on the books of the Supervising Architect's Office. But it appears that it was not entered as a contract item or as an addition or deduction. The account was closed in the usual way, the final footings showing the cost under the contract and the account of the authorization under the special act with the payments made thereunder followed. It was, of course, necessary and proper that there should be some record of the action taken for the relief of the contractor as directed by Congress. Even if this item had appeared in the regular account it could not, in my opinion, have entailed a liability against the United States unless within a proper construction of the contract, but in fact it did not so appear.

This suit was not commenced until almost four years after the final settlement with these architects. In the meantime there had been continued and rather persistent efforts to get an allowance at the hands of Congress including all the items herein sued for. The Judicial Code, section 159, requires petitions in this court to fully set forth, as to all claims, "the action thereon in Congress * * * if such action has been had." In Finding VIII the action had in Congress in this matter is fully set out. The effect to be given to such a situation has never, so far as I know, been the subject of accurate determination by the courts and I am not inclined to contend that the facts shown in this case can be construed to work any-

thing in the nature of an estoppel, but they are certainly significant and for consideration upon the merits of the case. It is safe to say from the facts found that in the beginning these plaintiffs did not conceive that they were entitled as a contract right to any compensation because of this extra payment made the building contractor, but were then in the attitude of seeking the bounty of Congress. They very significantly urged in their brief submitted to the committee having under consideration the bill introduced for their relief the "equity and justice" of their claim and that "inasmuch as Congress has relieved the said Thomas Butler for damages resulting from the same cause it can not with fairness reject their claim," and while there was no final action by Congress with reference to their claim it is for consideration that the committee directed by Congress to investigate the matter and having before it all the facts set up
not only in their brief but presented personally by one of the
52 plaintiffs, and being fully advised also as to the relief granted
the building contractor, reported favorably upon only one of the items claimed and that item is included in the judgment rendered in this case. It is safe to say under all the facts shown that for nearly four years there was no conception by anybody concerned with the matter that there was contractual liability to these plaintiffs on account of this item and that that asserted view of the matter is an afterthought. And in this connection it is not improper to observe also that when this action was commenced there was then pending a resolution to refer the last introduced bill to this court under the Tucker Act for findings and conclusions. The bill which it was then proposed to refer had been introduced in Congress more than three years after the final settlement made with these plaintiffs.

For the reasons stated I dissent from the inclusion in the judgment of the claimed percentage on the sum paid the building contractor under the special act quoted.

I am authorized to state that Chief Justice Campbell concurs in this dissent.

53 *VI. Judgment of the Court.*

At a Court of Claims held in the City of Washington on the fifteenth day of March, A. D., 1920, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiffs and do order, adjudge, and decree that Isaac T. Cook (executor of the estate of William S. Eames, deceased) and Thomas C. Young, as aforesaid, are entitled to recover and shall have and recover of and from the United States the sum of nine thousand and twenty dollars and thirty-eight cents ($9,020.38).

By the Court.

VII. Defendants' application for and allowance of an appeal.

From the judgment rendered in the above-entitled cause on the 15th day of March, 1920, in favor of the claimant, the defendants, by their Attorney General, on the 4th day of June, 1920, make application for, and give notice of, an appeal to the Supreme Court of the United States.

FRANK DAVIS, Jr.,
Assistant Attorney General.

Filed June 4, 1920.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

JUNE 6, 1920.

54 Court of Claims.

Isaac T. Cook, executor of the estate of William Sylvester Eames, and Thomas Crane Young, *vs.* The United States. No. 33700.

I, F. C. Kleinschmidt, assistant clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law; of the opinion of the court by Hay, J., and concurring opinion by Booth, J.; of the dissenting opinion by Downey, J.; of the judgment of the court; and of the defendants' application for and allowance of an appeal to the Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this ninth day of June, A. D. 1920.

[SEAL.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

(Indorsement on cover:) File No. 27,748. Court of Claims. Term No. 80. The United States, appellant, *vs.* Isaac T. Cook, executor of the estate of William Sylvester Eames, and Thomas Crane Young. Filed June 12th, 1920. File No. 27,748.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

UNITED STATES OF AMERICA, APPELLANT,
v.
ISAAC T. COOK, EXECUTOR OF THE ESTATE of William Sylvester Eames, and Thomas Crane Young, appellee. } No. 80.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF THE CASE.

Eames & Young were architects in St. Louis, Mo. Eames died and Cook was appointed his executor.

In 1903 the United States submitted to said firm a program for a competition for the selection of an architect for the erection of a United States custom-house building at San Francisco, Calif., and invited said firm to submit a design therefor.

The firm submitted its design, etc., and was engaged. The contract was signed on February 6, 1904.

The firm prepared the plans, etc., and supervised the erection and fully complied with the terms of the contract.

The contract for the building was let to Thomas Butler at the contract price of one million one hundred ninety-four thousand dollars ($1,194,000).

The building was completed January 16, 1911, except some odds and ends.

The architect's services were finally terminated in February, 1913, and voucher in final settlement was paid on March 8, 1913.

The customhouse building was to contain a subtreasury.

Work on the construction of the building was begun in August, 1905. About a year later the Government determined to erect a separate building in San Francisco for said subtreasury and the architects were required to change the plans so as to eliminate therefrom the provisions for said subtreasury. In so doing the architects did extra work of the reasonable value of $1,200.

Originally the Government expected to put the heating apparatus in the adjoining apprasier's warehouse building.

The architects were to provide for all the apparatus for heat and light situated in the customs building, exclusive of gas and electric fixtures, but were directed to stop their work at the alley separating the customhouse from the appraiser's warehouse building.

Afterwards the architects were required to draw plans, etc., for the reconstruction of boiler plans in the old appraiser's stores building. The reasonable value of the work so performed is the sum of $2,725.

These two items are admitted by the Government to be due.

The contract provided for fees as follows:

> And the party of the first part covenants and agrees to pay, or cause to be paid, unto the party of the second part, or to the heirs, executors, or administrators of the party of the second part, a fee computed at the rate of five per centum upon the actual cost of the work executed from the drawings and specifications and under their supervision, *as shown upon the books of the Supervising Architect's office, by the net amounts of contracts awarded and proposals accepted for additions or deductions, but not including*, etc. (Italics mine.)

The payments were to be made as follows: Two-tenths of the fee when the preliminary drawings are completed and approved; three-tenths of the fee when the general working drawings and specifications are completed and copies thereof delivered to the Supervising Architect; "and the balance of the fee monthly upon the basis of payments for work performed and in place as of record upon the books of the Supervising Architect's Office, or as ascertained to be due to the several contractors who execute such work; provided, that until the actual cost of the work executed from the architects' drawings and specifications and under their supervision can be determined, the monthly payments on account of the fee shall be computed upon the proposed cost of said building as estimated by the party of the second part, viz, one million two hun-

dred seventy-seven thousand six hundred ($1,277,600) dollars—or as may be readjusted from time to time; *and upon the completion of the building the entire fee shall be finally based* upon and computed on the *actual construction cost* of the work executed *from the architects'* drawings and specifications and under their supervision, *as shown upon the books of the Supervising Architect's Office, exclusive of the cost of the items* hereinbefore excepted." (Italics mine.)

The work progressed in usual manner until the great earthquake and fire. Because of this earthquake and fire, the price of material and labor advanced so much that it cost the contractor $104,404.74 more than his contract price, not allowing him one cent of profit. Congress was petitioned by Butler to pay him his loss, which he placed at $246,658.47. He was also compelled to pay $12,965 as a penalty provided by the contract for 6 months of the 33 months delay in finishing the building, which it was held was due to his lack of diligence.

Congress passed the following act:

> The Secretary of the Treasury is authorized, upon completion of the customhouse of San Francisco, California, to pay to Thomas Butler, the contractor for the construction of said building, in addition to the contract price thereof, such sum as may be equitable and just to reimburse said contractor for any loss actually sustained in consequence of the earthquake and great fire of April, 1906, not exceeding the sum of $250,000: *Provided*, That the amount allowed said Thomas Butler shall not

> be sufficient to enable him to make any profit out of the making and executing of said contract.

The committee appointed by the Secretary of the Treasury audited Butler's account and found that, without allowing him any profit, and compelling him to pay out of his own pocket $12,965 for six months' delay in finishing the building, he had expended above his contract price $104,404.74, and he was paid that amount. Section 7 of the finding of facts includes the following:

> The report of the committee appointed by the Secretary of the Treasury to adjust said claim of Thomas Butler shows that said additional payment covered only the actual increased cost to the contractor of constructing said building due to the earthquake and fire of 1906, exclusive of any profits to the contractor. Said report also shows that said increased cost was due to the increased cost of labor and material caused by the earthquake and to the delay caused thereby in completing the building.

The architects also petitioned Congress in July, 1913, to be paid all the items herein sued for. The bill was referred to the Committee on Claims. Mr. Young appeared and testified, and both filed a printed brief with the committee in which they said that the bulk of their damages resulted from an act of God, and that Congress, as a matter of equity and justice, should relieve them in the same manner it had relieved Thomas Butler.

They asked—

(1) On account of the earthquake and fire	$18,700.00
(2) Because of the change concerning the subtreasury	1,200.00
(3) On account of the heating plant	2,544.84
(4) Five per cent on the ~~$101,404.74~~, or	5,095.38

This bill did not pass. 101,907.66

In June, 1916, another bill was introduced in the House of Representatives. In May, 1916, a resolution was introduced in the House of Representatives referring said last-mentioned bill to the Court of Claims for findings of fact and conclusions of law. While this resolution was pending the present action was commenced in January, 1917.

The only item in controversy here is the 5 per cent item on the appropriation of ~~$104,404.74~~, amounting to ~~$5,220.20~~. 5015.38 101,907.66

Three of the judges concurred in giving judgment for this 5 per cent item and two dissented.

II.

ARGUMENT.

The Government contends that this item is not properly to be included in the actual construction cost of the work under the contract as shown upon the books of the Supervising Architect's Office.

The majority opinion of the lower court holds that this item is for work thus executed, and that the sum aforesaid was shown upon the books of the Supervising Architect's Office.

The contract clearly provides for 5 per cent upon the actual cost of the work executed from the drawings, etc., as *shown upon the books of the Supervising*

Architect's Office by the net amounts of contracts awarded and proposals accepted for additions and deductions.

It also provides that upon completion of the building the entire fee shall be finally based upon and computed upon the *actual construction cost of the work* as shown upon the books of the Supervising Architect's Office.

The account very properly first sets up the contract price. When the various additions are made and the deductions subtracted the result is the net contract price. See Chicago Varnish Co. v. Rice, 736-738

When the books are thus balanced, we have the "actual cost of the work," or "the actual construction cost of the work under the contract."

In other words, the architects' fees are to be calculated upon the *actual cost to the United States under the contract*, as shown upon said books.

The cost to the contractor and the cost to the Government are expected to differ. This difference is usally the contractor's profit. If Congress had not seen fit to relieve this unfortunate contractor, no other construction of the architects' contract would have been even suggested.

When the contract was entered into, it was contemplated by all parties that the building would be erected in the usual manner and without anticipating any special appropriation by Congress.

A fair interpretation of the majority opinion is that the lower court would not have given judgment for this item had not the extra payment made to the

contractor under the special act been entered on the books of the Supervising Architect's Office.

Here is where we differ with the majority opinion. The account with reference to this building was closed in the usual way, with the final footings; and then on the lower part of the page was the account of the authorization under the special act with the payments made thereunder.

It was necessary and proper that an account of this additional appropriation, *which was in effect a gift to the contractor*, should be entered upon the books of the Government. No doubt, for convenience this item and the disposition thereof was entered on the lower part of the same page. Thus, it did not appear in the regular account with reference to the construction of the building. Even if it had appeared as a part of the contract account, that would not have made it a part of the original contract. #

This suit was commenced four years after the final settlement with the architects. Claimants' continuous efforts to have Congress appropriate for their relief indicate that they did not conceive that they had any contract rights with the Government to any compensation because of this extra payment made the building contractor, but were seeking a bounty of Congress on the basis of justice and equity; one of their principal grounds being that Congress had relieved Butler from his damages resulting from the same cause.

This was a gift!
Coulicus Board of Supervi

These architects were to receive 5 per cent on work executed from the drawings, etc., under the contract, but not on a donation made by Congress to relieve Butler because he had to pay higher wages and greater prices for material than he had anticipated, and which advances were caused by an earthquake and a fire.

They were to be allowed 5 per cent on the cost of the construction under the contract. The extra expense incurred because of the earthquake and fire was not a part of the original contract, and was never dreamed of when that contract was made.

The architects were allowed 2½ per cent for their drawings, etc., leaving 2½ per cent for supervising construction. If they are to be allowed anything on the grounds of equity and justice they should not be allowed, in any event, more than 2½ per cent for supervising the construction, and that only to the extent of their actual loss.

The earthquake and fire did not change the plans of construction. Their plans were already drawn, for which they were already paid. The extra cost was for advance in the cost of labor and material.

Under the act reimbursing the contractor for the increased cost of labor and material caused by the fire and earthquake, he was to forfeit all his profit upon the entire contract, which contract finally amounted to about $1,277,600.

This donation was not made under the contract, but because of the earthquake and fire.

Butler's original contract and figures gave him an estimated profit of $121,720.

The United States said to Butler, we will save you from loss, but *you must be just* while *we are generous.* You must forfeit all your profits on this great contract, which took you five and one-half years to finish; and you must pay out of your own pocket $12,965 for delay in completing the contract.

The architects were paid $68,310.77.

If they want that same justice and equity which Butler was given, why did they not produce their books, show their actual expenses, strike a balance, and if that balance showed a loss, ask for that amount from Congress and from the court?

They have shown no loss.

They are seeking to recover under a written contract, and by that contract they must stand or fall.

They are not asking for that same justice received by Butler; but they want 5 per cent on the amount of the charity extended to Butler to save him from a *very great loss.*

They are entitled to 5 per cent on the cost of construction under the contract. I know of no law which would have permitted Butler to recover his loss by virtue of his contract; therefore, I arrive at the irresistible conclusion that claimants are not entitled to 5 per cent on the donation of ~~$104,404.74~~ 101,907.66.

ROBERT R. LOVETT,
Assistant Attorney General,
Attorney for Defendant,
United States Department of Justice,
Washington, D. C.

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WM. R. STAR

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 80.—October Term, 1921.

United States of America, Appellant, *vs.* Isaac T. Cook, Executor of the Estate of William Sylvester Eames, and Thomas Crane Young, Appellees.	Appeal from the Court of Claims.

BRIEF FOR APPELLEES.

William R. Harr,
Chas. H. Bates,
Attorneys for Appellees.

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BRIEF FOR APPELLEES.

The brief for the United States admits that, as held by the Court of Claims, appellees are entitled to compensation upon the first two items of their petition for extra work performed by the architects, one amounting to $1,200 and the other amounting to $2,725, making a total of $3,925, conceded by the Government to be due plaintiffs on this appeal.

This appeal, therefore, involves merely that much of the judgment of the Court of Claims which holds that, in computing the architect's fee of five per cent, the additional amount paid by the Government to Thomas Butler, the contractor for the construction of the San Francisco customhouse, pursuant to the Act of Congress of May 27, 1908, should be considered, the Court

of Claims allowing upon this item $5,095.38, which is five per cent of $101,907.66.

It may be noted, in passing, that the amount actually paid said Thomas Butler, according to the report of the Treasury Department filed in this case, was $104,404.74 (see Finding of Fact VII, Record, p. 31), but the Court of Claims in rendering judgment in this case followed the statement in plaintiff's petition that the amount so paid was $101,907.66, plaintiff's information at that time not being entirely accurate.

The opinion of the Court of Claims, rendered by Judge Hay, and the concurring opinion, rendered by Judge Booth, discuss the question presented quite fully, and their careful perusal is requested.

Both the dissenting opinions in this case and the brief for the United States stress the first provision of the paragraph of the architects' contract with reference to the architect's fee, which refers to the net amount of the contracts awarded and proposals accepted for additions and deductions, although, as hereinafter pointed out, we see nothing in that provision inconsistent with the architects' contention in this suit.

But the controlling provision of a contract is usually the final one, and in this instance the architect's contract finally states (Rec., p. 11):

> "And upon the completion of the building the entire fee shall be finally based upon and computed on the actual construction cost of the work executed from the architect's drawings and specifications and under their supervision, as shown upon the books of the Supervising Architect's Office, exclusive of the cost of the items hereinbefore excepted," (i. e., the items referred to in the first provision as to the architect's fees, namely, "the cost of site, or furniture, electric plant,

gas or electric fixtures, mural painting, architect's fee, or the contingent expenses incident to the construction of said building set apart by the party of the first part.")

The evident purpose of this final provision was to make the *actual* cost of the construction of the building govern, in determining the architect's fee (with the exceptions stated), rather than estimated or even contractual costs, unless adhered to.

The only question presented, therefore, is whether the additional amount paid Thomas Butler, the contractor, for the construction of the building, pursuant to said Act of Congress, as shown upon the books of the Supervising Architect's Office, is to be regarded as a part of the "actual construction cost" of the building.

The Government contends that this additional payment was merely a gratuity, because, it says, the Government was under no *legal* obligation to pay the contractor for the construction of the building this additional amount. But the question is not whether the Government was legally bound to pay this additional amount, but whether the payment so made is to be considered as forming a part of the construction cost of the building within the meaning of the architects' contract.

We submit that the better view is that taken by the majority of the Court of Claims, namely, that this additional amount constituted a part of the construction cost of the building within the meaning of the architects' contract, the effect of the Act of Congress authorizing its payment being to increase the actual cost to the Government "of the work executed from the architects' drawings and specifications and under their supervision" so much.

The record shows that the additional payment to Thomas Butler merely covered actual costs incurred by him in the construction of the building, without any allowance for profit.

Although the Government may not have been bound by the terms of its contract to pay this additional cost, Congress may have considered that it was under a moral obligation to do so, since it was merely paying for value received, these increased costs going into the building.

If this additional sum had been allowed the contractor by the Secretary of the Treasury, without the intervention of Congress, no question would have been raised as to the propriety of its being included in computing the architects' fee.

The situation is the same as if a private individual were to contract with a builder for the erection of a house for a certain price, and, upon the builder showing that the house cost him considerably more than had been anticipated, said individual, possessing a keen sense of his moral obligations, and realizing that the additional value had entered into the building, had waived his right to insist upon the contract price and had paid the builder enough more to reimburse him for the increased cost of the building. The mere fact that such additional payment would be voluntary, and not required by the terms of the contract, would not change the fact that the additional amount so paid by him constituted a part of the actual construction cost of the building.

As pointed out by Judge Hay in delivering the opinion of the Court of Claims in this case (Rec., p. 35):

"It will be observed that this contract provides 'upon the completion of the building the entire fee shall be finally based upon and computed on the actual construction cost of the work executed from the architects' drawings and specifications and under their supervision, as shown upon the books of the Supervising Architect's Office, exclusive of the cost of the items hereinbefore excepted.' The $104,404.74 upon which the plaintiffs claim that they are entitled to commission is a part of the construction cost of the work executed from the architects' drawings and specifications, and the sum aforesaid was shown upon the books of the Supervising Architect's Office. Under the contract they are entitled to be paid their commission on this sum."

In his concurring opinion, after analyzing the several provisions of the architects' contract, Judge Booth said (Rec., p. 36):

"Supposing that in this case the officers of the Government had concluded to do a vast amount of work by day labor, which might have been done if a sufficient margin obtained between the limit of cost and contract price. Would it then be said that the cost of such work was not to be included in the computation of actual cost of the building, so as to form a basis for the allowance of plaintiffs' fees? No written contract would have existed, but surely the item would be actual cost."

Manifestly, if the contingency suggested by Judge Booth had occurred and such day labor had not been included in the actual cost of the building in computing the architects' fee, the intent of the contract that they

should be paid five per cent of the "actual construction cost of the work executed from their drawings and specifications and under their supervision" would have been defeated.

It is to be observed that the architect's fee, in these cases, is based upon the actual cost of constructing the building from the architect's own plans and specifications and under his supervision, exclusive only of items not properly entering therein, which are specifically enumerated, namely, "cost of the site, or furniture, electric plant, gas or electric fixtures, mural painting, architects' fee, of the contingent expenses incident to the construction of said building set apart by the party of the first part" (the Government).

The fact that the increased costs covered by the additional payment to Thomas Butler, the contractor, does not come within the exceptions just specified, would seem to be controlling.

Judge Booth further said (Rec., p. 36-37):

> "The sum allowed by act of Congress to Butler, the contractor, was not a gratuity; quite the contrary—it was based on precise estimates made after personal inspection and certified to as items of actual construction work. It was in legal effect an increase in the limit of cost, and in the end made the building actually cost $1,382,004.74, whereas originally it was designed to limit the cost to $1,277,600. Certainly, the mere fact that Butler might not have recovered this amount in court does not convert the sum allowed as actual cost into a gratuity. Congress every session sends many controversies to this court by special jurisdictional acts, where the claimants are barred from judicial proceedings otherwise. In this instance instead of waiving legal defenses in a court

> of justice, Congress referred the matter to the proper department of the Government to investigate and determine the sum to be paid not in excess of the amount expressly limited in the bill. It did not give Butler any fixed sum."

If the additional amount paid Butler were a mere gratuity or gift, then it would not be considered as income under the Federal income tax laws, which exempt "gifts." But the Treasury Department has held that amounts paid persons in consideration of services performed, whether legally required to be paid or not, are not "gifts" within the meaning of the income tax laws, but "in the nature of additional compensation." (Montgomery on Income Tax Procedure, 1921, p. 48.)

The architects were required, under their contract, not only to provide all plans, specifications, working drawings, estimates of cost, etc. (which they were to revise from time to time to meet changing situations), but it was their duty to supervise the construction of the building, so as to prevent any diminution of its structural strength or increased cost of construction, inspect all work and materials, reject any work or materials not strictly in accordance with the contracts, certify vouchers of contractors for work and materials, and also to provide at their own expense "a superintendent of construction." For all this work they were to be paid a fee based upon the *actual* construction cost of the building with certain express exceptions. Why then should any cost, not expressly excepted, be excluded?

It was found as a fact by the Court of Claims in this case that (Rec., p. 31):

> "Owing to said earthquake and fire at San Francisco in 1906, there was a delay of about three years in the completion of the customshouse and it was necessary for the architects, under their contract, to keep a superintendent of construction on the building for that further length of time at a cost of about $6,700; also during this period and as a result of the delay the office and certain contingent expenses of the architect went on."

In other words, the additional cost to the architects of keeping one superintendent on this work, due to the earthquake and fire, was more than the five per cent commission they are asking. Every principle of equity and justice therefore requires that they be compensated for this additional work by the Government if possible. Any doubt as to the proper construction of the contract should therefore be resolved in their favor.

As above stated, the view announced by the Court of Claims is also in harmony with the provision in the contract that the architects' fee was to be computed upon the actual cost of the work "as shown upon the books of the Supervising Architect's Office, by the net amount of contracts awarded and proposals accepted for additions and deductions", upon which the Government relies. Thomas Butler was paid the additional amount referred to for work executed from the architects' drawings and specifications and under their supervision, and this additional amount was in effect merely an increase in the contract cost of constructing the building. It is not as if the architects were asking to be allowed a fee upon costs not covered by their drawings and specifications or executed under

their supervision and never intended to be included in the basis of computation.

It is interesting to note that Mr. James Knox Taylor, who was Supervising Architect of the Treasury at the time the contract for the construction of the San Francisco Customhouse was let and until its completion, was also of the opinion that the architects were entitled to their five per cent upon this payment.

Mr. Taylor, in answer to a question whether he regarded the additional sum paid Thomas Butler as part of the "actual construction cost" of the work within the meaning of the architects' contract, said (Rec. in Ct. Cls., p. 102):

> "I did, most certainly; it was part of the contract and was a source of expense to the architects who had charge of the work under our supervision."

Mr. Taylor further said (*id.*):

> "Mr. Thomas Butler, contractor on the customhouse in San Francisco, was caused an additional expense by reason of delay in carrying forward his work, and replacing and renewing certain work that was damaged by the earthquake. He was also very vitally handicapped by the increased demand for labor and material that necessarily arose from the numerous rebuilding projects that came up on account of the fire and the disorganization of his force from the same causes. He was therefore entitled, both the office and myself felt, to additional compensation on these grounds, and after a careful consideration and estimating of what the actual sum was that he would be entitled to, there was an additional authorization

made to him for the sum mentioned. This additional work and delay on the part of the contractor entailed on the architects who had charge of the work a very largely increased liability and delayed the completion of their work very much longer than it would otherwise have been, and increased their expenditures for personal attention and for the continuation of the representatives and office administration on the ground that much longer."

It is of course wholly immaterial that the architects applied to Congress for relief before going into the Court of Claims. Congress having relieved the contractor, Butler, it was but natural that the architects should hope for relief themselves from that quarter. But one does not waive his legal right to sue by applying to Congress for relief, nor does such an application warrant any prejudicial inference. Besides, lawyers as well as architects are sometimes mistaken not only as to the law but as to the outcome of judicial proceedings.

Respectfully submitted,

WILLIAM R. HARR,
CHAS. H. BATES,
Attorneys for Appellees.

November, 1921.

UNITED STATES *v.* COOK, EXECUTOR OF EAMES, ET AL.

APPEAL FROM THE COURT OF CLAIMS.

No. 80. Argued January 13, 1922.—Decided February 27, 1922.

Claimants contracted with the Government to plan and supervise the construction of a public building for a fee, to be paid on monthly estimates and final completion, of 5 per cent. of the actual cost of the work executed from their drawings and specifications and under their supervision, as shown upon the books of the Supervising Architect by the net amount of construction con-

tracts awarded and proposals accepted for additions or deductions. The building was delayed by an earthquake and fire and Congress made an additional appropriation to be paid the building contractor upon its completion, to recoup him for actually resulting losses due to increased prices of labor and materials; denying him any profit under his contract; and this extra payment was shown on the books of the Supervising Architect—but no appropriation was made for the claimants, although they had suffered likewise and had applied to Congress unsuccessfully.

Held: (1) The allowance to the building contractor was not a gratuity but an alteration of his contract based on a moral consideration. P. 526.

(2) Claimants were entitled to their percentage on the additional amount so paid, since their equity was equally as strong and the words of their contract permitted. P. 528.

55 Ct. Clms. 215, affirmed.

APPEAL from a judgment of the Court of Claims upholding a claim of architects for fees under a contract with the United States.

Mr. Assistant Attorney General Lovett for the United States.

Mr. William R. Harr, with whom *Mr. Chas. H. Bates* was on the brief, for appellees.

MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

Eames and Young, architects of St. Louis, made the plans for a custom house at San Francisco and supervised its construction. They were to receive compensation at the rate of five per centum upon the actual cost of the work. The work was long delayed, three years, by the San Francisco earthquake and fire which increased the cost of labor and materials. Congress authorized the Secretary of the Treasury within a limit of $250,000 to make good to the contractor his loss from the delay and enhanced prices so that he should receive enough to re-

coup him for his outlay but without profit. The architects claimed from the Government five per centum on the extra amount paid to the contractor. Eames died and Cook, his executor, joining with the surviving partner, Young, brought this suit in the Court of Claims. The Court of Claims gave judgment for $5,095.38, the full amount of the claim. The Government appeals.

The contract provided that the fee of the architects was to be computed at the rate of five per centum upon "the actual cost of the work executed from the drawings and specifications, and under their supervision, as shown upon the books of the Supervising Architect's Office, by the net amounts of contracts awarded and proposals accepted for additions or deductions." Until the actual cost could be determined, the monthly payments were to be on the proposed cost as estimated from time to time by the Government, and upon the completion of the building the entire fee was to be computed on the actual construction cost of the work executed from the architects' drawings and specifications and under their supervision, as shown upon the books of the Supervising Architect's Office. The extra amount paid the contractor was in fact shown upon the books of the Supervising Architect's Office though not of course included in the total cost stated before the passage of the act and the ascertainment of the amount due thereunder.

The clause in the Sundry Civil Appropriation Act, approved May 27, 1908, c. 200, 35 Stat. 318, providing for an extra payment to the contractor was as follows:

"The Secretary of the Treasury is authorized, upon completion of the custom-house in the city of San Francisco, California, to pay to Thomas Butler, the contractor for the construction of said building, in addition to the contract price thereof, such sum as may be equitable and just to reimburse said contractor for any loss actually sus-

tained in consequence of the earthquake and great fire of April, nineteen hundred and six, not exceeding the sum of two hundred and fifty thousand dollars: *Provided*, That the amount allowed said Thomas Butler shall not be sufficient to enable him to make any profit out of the making and execution of said contract."

The committee appointed by the Secretary of the Treasury to adjust the claim found that the actual increased cost to the contractor of constructing the building due to delay and the increased prices of labor and material was $101,907.66. During the delay of three years, the architects under their subsidiary contract had to keep a superintendent of construction on the building at a cost of $6,700, and their office and certain contingent expenses in San Francisco went on.

The Government contends that the amount awarded to the contractor under the act was a mere gratuity and can not be properly treated as a part of the cost of construction. We can not agree to this view. It seems to us that this was an alteration of the contract in response to equitable considerations. It was a change from unit prices to a cost plus nothing contract. It was not a mere lump sum gift. It was the result of inspection and examination as directed by Congress, and an award by actual estimates. It was the result of a change in the contract terms made by the principal in whose name and for whose benefit the contract was entered into, and acquiesced in by the contractor. It added to "the actual cost of the work executed from the drawings and specifications and under [the architects'] supervision, as shown upon the books of the Supervising Architect's Office, by the net amounts of contracts awarded and proposals accepted for additions or deductions." The additional sum was part of the net amount of the contracts awarded, as they were legally modified by the agreement of the parties embodied in the clause of the congressional act. The

architects' subsidiary contract for compensation contemplated changes in the amount of actual cost by additions and deductions, *i. e.*, by changes in the main contract, and a postponement of final calculation until the full actual cost had been ascertained. The change by legislation was, of course, not within the minds of the parties when the work was entered upon, because the earthquake and fire and change of situation were not anticipated. This, however, is not enough to exclude it from the operation of the architects' contract if the change can be brought fairly within the terms.

It is not helpful to point out that the United States need not have varied the terms of the main contract, or that no consideration moved to it in the change, or that the contractor could not have recovered anything additional in a suit without the legislation. There was the moral consideration which properly induced the recognition of an honorable obligation and turned an unenforceable equity into a binding and effective provision.

Reference is made to *Frisbie* v. *United States*, 157 U. S. 166, and other cases in which a pension is said to be a gift and not a vested right. These cases have no bearing on the one before us. They merely establish that Congress in shaping the form of its bounty may impose conditions and limitations on its acquisition and enjoyment by the beneficiaries which it could not impose on the use and enjoyment by them of a vested right.

An authority more helpful in the present case is that of *United States* v. *Realty Co.*, 163 U. S. 427. The question there was the validity of an appropriation by Congress of money to reimburse sugar planters who on the faith of a sugar bounty provided by statute, *Field* v. *Clark*, 143 U. S. 649, 694, had planted a crop and were subjected to heavy loss by repeal of the statute. The Government objected that the sugar bounty was unconstitutional and that Congress could not pay such a bounty either by

prior appropriation or by reimbursement. This court found it unnecessary to decide whether a sugar bounty was beyond the power of Congress; but assuming its invalidity, held that even though, in its purely legal aspect, an invalid law could not be made the basis of a legal claim, the planter had acquired a claim against the Government of "an equitable, moral or honorary nature," that Congress had power to pay the debts of the United States, that the Nation, speaking broadly, owed a "debt" to an individual when his claim grew out of right and justice; when, in other words, it was based upon considerations of a moral or merely honorary nature, and that the power of Congress extended to the payment of such a debt. The claim of the contractor in this case was more concrete than that of the sugar planter and was equitably recognized by Congress as part of the cost of the building to be paid by the Government.

The architects had just as great an equity in this matter as the contractor. The delays and rise in the prices affected their expenses proportionately. When, therefore, the contractor has received more for the work, it is just that the architects receive a percentage on what has thus been recognized by the Government as a "debt" to the contractor for his work, and the words of the contract are inclusive enough to permit this to be done.

The fact that the architects unsuccessfuly applied to Congress for relief similar to that accorded to the contractor is relied on as an admission by the architects that only by congressional action could they have equity done them. We do not consider this material or important. We can not say from anything before us but that the reason why Congress did not make special provision for the architects was the assumption that their equities might be worked out under their contract as they have been by this judgment of the Court of Claims.

Affirmed.